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Supreme Court, U.S.
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2007
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No.

IN THE

Supreme Court Of The United States

PRINCE GEORGE'S COUNTY, MARYLAND AND
DETECTIVE JOHN L. DOUGANS
Petitioners,

v.

DANIEL ANTHONY MILLER
Respondent.

On Petition for A Writ of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit misapplied the principles set forth in *Franks v. Delaware*, in excising more than material false statements alleged in a Complaint by excising allegations of negligence to determine if there remained sufficient content in an officer's affidavit to support a finding of probable cause and erred by not considering Petitioners argument that the alleged false statement(s) were not material or essential to probable cause.

2. Whether assuming a Fourth Amendment violation, the Fourth Circuit contrary to *Anderson v. Creighton*, erred in not considering that an officer is entitled to qualified immunity because it was not apparent in light of pre-existing law, that an officer who utilized a local criminal computer database and obtained a match for the first and last name of a *white male* suspect given to him by a victim of a crime to apply for a facially valid arrest warrant, would have known the computer data erroneously identified a *black male* with the same first and last name as that of the alleged white male suspect, which subsequently would cause the mistaken arrest of the black male.

RULE 14.1 (b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellee and Petitioner: Detective John L. Dougans is a Prince George County police officer who was defendant/appellee in the Fourth Circuit. Prince George's County, Maryland a Body Corporate and Politic was also a named defendant/appellee. Because petitioners are a governmental entity and an individual employee, no disclosures are required by Supreme Court Rule 29.6.

Plaintiff-Appellant and Respondent: Daniel Anthony Miller is respondent herein and was plaintiff/appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Prince George's County, Maryland and John L. Dougans, petitions for a writ of certiorari to review the published opinion of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit, dated January 22, 2007, is officially reported at 475 F.3d 621, and is reproduced at App. A, 1a-19a.

The order of the U.S. Court of Appeals for the Fourth Circuit, dated February 15, 2007, denying Petition for Rehearing En Banc is reproduced at App. B, 1b-2b.

The oral opinion of the U.S. District Court for the Southern District of Maryland, dated October 31, 2005 is unpublished and is reproduced at App. C, 1c-38c.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit sought to be reviewed was entered on January 22, 2007. The order of denial of Petitioners' petition for rehearing *en banc* was entered on February 15, 2007. This petition is timely under Supreme Court Rule 13.1. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Daniel Anthony Miller, (hereinafter "Miller") a *black* male, brought this action after he was *mistakenly* arrested in the State of Virginia on an open warrant from Prince George's County, Maryland, for a *white* male with the same first and last name. The warrant was for second degree burglary and theft of a lawnmower. An eyewitness to the crime who knew the homeowners, described to them that the suspect was a white male who drove a jeep. Subsequently, the female victim realized who the suspect was and in her written statement to Detective Dougans (hereinafter "Dougans') indicated that the person who stole her lawnmower was a white male named "Daniel Miller," who owns a jeep. Dougans ran the name and received three matches of the first and last names (*i.e.*, "Daniel Miller") through a local criminal computer database. Believing that he had identified the *white* male suspect through his computer search, along with other facts developed through his investigation, Dougans applied for an arrest warrant.

Unfortunately, Dougans did not realize at the time that the "Daniel Miller" match he believed to be for the white male suspect identified by the female victim as the perpetrator was that of Miller's. It became evident after the arrest of Miller that his *race* was entered erroneously as *white* into the local criminal computer database utilized by Dougans. As a result, Miller was mistakenly arrested and incarcerated in the Rappahannock County Jail. After several hearings in the Spottsylvania District Court and a total of nineteen days incarceration, Miller was released.

Miller filed his Complaint in the Circuit Court for Prince George's County, Maryland alleging Dougans knowingly made material false statements, which lead to his unlawful arrest in violation of 42 U.S.C., §1983 and related state law claims. Dougans removed the matter to the United

States District Court for the District of Maryland based on federal question. The named Defendants were Prince George's County, Maryland (hereinafter "the County") and Dougans who applied for the arrest warrant. In his Complaint, Miller alleged that Dougans made *two false* statements in his application for probable cause that lead to his unlawful arrest.

Miller alleged in paragraph 8 of his complaint that "Defendant John L. Dougans made materially false statements in the application for the warrant to arrest the plaintiff. Dougans stated that Michael Moses had informed him that the tag number of the Jeep in question was 938751. But Moses had not seen the tag and told police so. Dougans stated the he learned the identify of the plaintiff by interviewing the Nickols and other witnesses. In fact, he had not done so, for Nickols and Michael Moses clearly did not identify the plaintiff as the suspect." App. 4d & JA. 10-11. Miller made no other allegations of false statements in his *entire* Complaint. App. D.

At the conclusion of discovery, Defendants filed a motion for summary judgment as to all claims. Defendants successfully argued that the two statements above were not material false statements and even if they were, the statements were not essential to the finding of probable cause. Miller unsuccessfully argued in the District Court that Dougans lacked probable cause based on the above-alleged material false statements in his application for an arrest warrant. The Honorable Roger Titus of the United States District Court found that 1) Dougans actions were reasonable 2) Miller did not make a substantial preliminary showing that Dougans knowingly and intentionally, or with reckless disregard for the truth, included information in his application for the warrant, 3) the alleged false information was not essential to the probable cause determination because the probable cause determination was based on Dougans

correct reporting to the magistrate that the white male identified as Daniel Miller was the person who had stolen the lawnmower and 4) Dougans was entitled to qualified immunity. App. 28c-36c & JA. 684-686.[1]
Miller filed a timely appeal.

The United States District Court for the District of Maryland had jurisdiction over this action pursuant to 28 U.S.C. §1331 as the Complaint alleged a violation of 42 U.S.C. §1983. The United States Court of Appeals for the Fourth Circuit has jurisdiction over this appeal based upon 28 U.S.C. §1291. The Fourth Circuit after oral arguments reversed the United States District Court for the District of Maryland in a published opinion.

STATEMENT OF THE FACTS

This case results from the *mistaken* arrest of Miller, a *black male*, in the State of Virginia on an open warrant from Prince George's County, Maryland for a *white male* with the same first and last name. The warrant was for second degree burglary and theft of a lawnmower. An eyewitness to the crime, Moses, who knew the homeowners, described to them that the suspect was a white male who drove a jeep with an attached trailer and their lawnmower on it. Subsequently, the female victim realized who the suspect was and in her written statement to Dougans indicated that the person who stole her lawnmower was a white male named "Daniel Miller," who owns a jeep. While it is now evident that the wrong person was arrested, at the time Dougans investigated the crime, it is undisputed that the suspect developed for the burglary and

[1] "JA" refers to the joint appendix that was filed by the parties in the Fourth Circuit appeal.

theft was a white male named "Daniel Miller."[2] In addition to interviews and obtaining written statements from the female victim, an eyewitness and others, Dougans conducted a local computer search of the name "Daniel Miller." The computer search returned three Identification Inquiry matches for the first and last names "Daniel Miller."[3] Among the matches were Daniel Paul Miller, the actual suspect's father, Miller's Identification Inquiry identifying him as a black male and the other Identification Inquiry erroneously identifying Miller as a *white male*. JA. 50, 425-26.

Dougans knew that the Identification Inquiry for Daniel Paul Miller was that of the father of the actual suspect. JA. 117. Along with other facts developed through his investigation and his belief that the other Identification Inquiry was for the white male suspect he was looking for, Dougans applied for an arrest warrant. JA. 29.

Prior to conducting the above computer search of the name "Daniel Miller," and seeking an arrest warrant, Dougans was aware of the following facts based on his investigation:

On July 23, 2002, victims Jeffery & Jessica Nickols discovered their lawnmower was stolen out of their garage after they returned home from an out-of-town trip to New Jersey. JA. 33. After filing a report, Jeffrey & Jessica Nichols made inquiries throughout their neighborhood about

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[2] The "Daniel Miller" identified by the victim is *actually* Daniel Paul Miller, a white male, not the Daniel Anthony Miller as stated on the arrest warrant.

[3] This search technique generates a computer printout called an Identification Inquiry for each match. The printout has the person's first, middle and last names. It also includes the person's race, date of birth, height and weight.

the incident and learned from an eyewitness, Michael Moses that he observed a green Cherokee with an attached trailer, driven by a white male pulling out of the victims' residence hauling away their lawnmower. JA. 34. Jessica Nickols realizing "Daniel Miller" has a green Cherokee looked for him at his house, his girlfriends' house and then at a friend's house that knew Daniel Miller. Jessica Nickols in her written statement to Dougans stated "...they told us that Daniel and his friends were on a stealing spree and that they did steal our lawnmower..." JA. 34. Jessica Nickols told Dougans that the identity of the driver who owns a green jeep as described by eyewitness Moses was a white male with the name "Daniel Miller." JA. 34, 43.

On August 13, 2002, eyewitness Moses stated to Dougans in his written statement that he wrote down the tag # of the green truck/jeep with a trailer attached to it with the Nichols lawnmower on it. JA. 37-39. Dougans investigation into the tag number revealed they had allegedly been turned into MVA and expired 3/99. JA. 34. As part of his investigation into the tag number, Dougans discovered that the owner associated with the tag number was a *black* male with the name Daniel Anthony Miller. However, Dougans *excluded* Miller as a suspect because he was a black male associated with the tag number. JA. 98-115.

After the above investigation, on January 22, 2003, Dougans Application for an arrest warrant to District Court Commissioner Thurston stated as follows:[4]

> I, the undersigned, apply for a statement of charges and a summons or warrant which may lead to the arrest of the above named Defendant because on or about July 23, 2002 at 9004 Ballard Lane, Clinton,

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[4] Dougans affidavit is re-typed verbatim.

Prince George's County, Maryland, the above named Defendant Daniel MILLER did break and enter the storehouse of Jeffery & Jessica NICKOLS located at 9004 Ballard Lane, Clinton, Maryland, with the intent to commit a theft. On July 23, 2002 the victims Jeffery & Jessica NICHOLS returned to their residence at 9004 Ballard Lane, Clinton, Prince George's County, Maryland from an out-of-town trip to New Jersey. When the victim Jeffery Nichols went out to his garage at the mentioned address, he discovered that unknown person(s) had broken out side window of his garage to gain entry; while inside the garage, area was ransacked and victim's Griffin Lawnmower was stolen. The victim filed above police report with Cpl. D. Robinson #1845 of the Clinton Police Station. After filing the report, victims Jeffery & Jessica Nichols walked throughout their neighborhood inquiring about the above report incident to their residence. During the victim's inquiry, they learned from witness Michael MOSES that a green Cherokee, driven by a white male had been observed by the witness MOSES pulling out of the victim's residence with a wooden trailer attached to the mentioned green Cherokee haling the victim's Griffin Lawnmower away. The witness Moses recorded the tag of the vehicle as Maryland 938751M.[5] The investigation into the mentioned tag

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[5] In his *written* statement, "I wrote down the tag #," eyewitness Moses did not include the actual tag number. However, Dougans in his application for probable cause included an *actual tag number*. 938751M supposedly given to him on a piece of paper by eyewitness Moses as the tag number of the getaway jeep driven by the white suspect, however Dougans was never able to locate the piece of paper. On Miller's identification data, he formerly owned a jeep with tag number 938751M, which expired on 3/99. This is Miller's first alleged false statement that Dougans inclusion of the actual tag number after eyewitness Moses' statement was a

revealed, they had allegedly been turned into MVA and expired 3/99.

The identity of the Defendant MILLER was obtained interviewing the victims and witness.[6] The mentioned Griffin Lawnmower was recovered several hours later at the Co-Defendant OWENS residence 9004 Woodyard Road, Clinton, Prince George's County. The Co-Defendant Owens stated in his written statement, he had purchased the mower from a crack head unknown name. The Co-Defendant Owens is the boy-friend of the Defendant MILLER sister, whom is a juvenile (17-years old). The jeep Cherokee is the property of Defendant Miller, witness advised it was the same vehicle seen by him driving out of the driveway of victim Nichols residence.[7] This Detective has attempted to make contact with Defendant Miller, but as of this date has been unable, due to Defendant staying at several different addresses throughout the county. The value of the

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material false statement and without it, Dougans application would have lacked probable cause for his arrest.

[6] Dougans reference to the identity of Defendant MILLER was based on the undisputed written statements from eyewitness Moses and female victim who both described the suspect as a white male and female victim's identification of the white male having the name "Daniel Miller." This is Miller's second alleged false statement that Dougans made identifying him, *i.e., a black male*, as the suspect when the victim and witnesses identified a *while male* as the suspect.

[7] Dougans statement that the jeep is the property of Defendant Miller was based on the written statement by the female victim that she realized "Daniel Miller" has a green Cherokee after she was told by eyewitness Moses that he witnessed a jeep Cherokee driving away with their lawnmower on it. JA. 42-43.

> mentioned Griffin Lawnmower is $700.00. The lawnmower was recovered under CCN: 02-204-1467, at the Co-Defendant Owens residence, victim were on-scene at the time of the mentioned recovery and the mower was released to them at that location. The above events occurred in Prince George's County, Maryland. JA. 33-35.

On January 22, 2003, Commissioner Thurston signed the *above* District Court Application for Statement of Charges and Arrest Warrant for what was believed by Dougans to be for the *white* male suspect identified by the female victim bearing the name "Daniel Miller". JA. 29-35.

Subsequently, Dougans retired without executing the above arrest warrant. The following facts occurred *after* Dougans retired:

On May 29, 2004, Miller was stopped for a traffic violation by Virginia State Trooper, Rodney Ward (hereinafter "Trooper Ward") on Route 1, Jefferson Davis Highway in Virginia. JA. 137, 139-141, 145. Trooper Ward ran a computer check on Miller and was notified by dispatch that Miller was wanted for 2nd degree burglary in Maryland. JA. 141, 145.[8] Acting pursuant to the above dispatch, Trooper Ward placed Miller under arrest and transported him to the Spotsylvania Magistrates office. JA. 141. Trooper Ward arrested Miller despite the fact that he knew prior to the arrest that his HIT Request and Reply from Prince George's County sought a *white* male and not a *black* male. JA. 146, 148-159, 162.

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[8] The terminology for this process to dispatch is called a HIT request and the response from dispatch is called a Reply based on information entered into the department's computer database.

In response to Trooper Ward's HIT request, the Maryland Sheriff's Department as standard procedure sent via facsimile to the Virginia State Police, a copy of the warrant, statement of charges and the application for statement of charges. JA. 189, 208-219. Trooper Ward witnessed the receipt and examination of a seven-page facsimile from Prince George's County Sheriff's Office by Magistrate Joseph T. Sartori regarding the theft of the lawnmower. The facsimile consisted of the arrest warrant, the statement of charges and the application for statement of charges. JA. 150-153.

Trooper Ward and Magistrate Sartori discussed the race discrepancy of Miller [i.e., *white* versus *black*] and determined Miller could not be released solely based on race. JA. 150-153. Magistrate Sartori issued a Warrant of Arrest for Extradition for Miller, pursuant to Virginia Code §19.2-100 [i.e., fled justice from Maryland on charge(s) of Burglary 2nd Degree]. A Commitment Order was also issued for Miller to be held without bond until his hearing date of 6/1/2004, at 8:30 a.m. JA. 221-222.

On June 1, 2004, Sheriff Ricky Burrow (hereinafter "Sheriff Burrow") of the Sheriff's Department[9] in response to an extradition request from the Rappahannock Jail *changed* the *race* of the wanted Daniel Miller from *white* to *black* on the Office of the Sheriff's Fugitive Case Tracking form. JA. 192-195, 224-230. Sheriff Burrow made *his own* determination that the individual was *black* rather than *white* and that Rappahannock Jail was holding the correct man. JA. 192-202.

After Sheriff Burrow notified Rappahannock Jail that they had the correct man and to hold him for extradition, he

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[9] The Sheriff's Department is not an entity of Prince George's County.

contacted the Prince George's County Police and was informed that the suspect for the break-in and theft was a white male based on their report. Notwithstanding this information, Sheriff Burrow did not change his earlier decision and instruction to Rappahannock Jail that the warrant sought a black male and to hold Miller because he believed that the guy was a black male. JA. 204-206.

On June 1, 2004, Miller appeared in Spotsylvania District Court and an Order of Continued Custody was issued for Miller to be held without bond until July 19, 2004. Miller declined to waive extradition. JA. 233-247, 249. On June 2, 2004 a Governor's Warrant was typed and submitted to the Office of the State's Attorney for Prince George's County, Maryland. JA. 203, 224.

On June 8, 2004, Miller again appeared in Spotsylvania District Court represented by Robert Jenkins, Esquire. At this hearing, Miller waived extradition and an Order of Continued Custody was issued for Miller to be held without bond until July 8, 2004. JA. 233-247, 249, 251.

On June 15, 2004, Miller again appeared in Spotsylvania District Court represented by another attorney, Vernon Key. An Order of Continued Custody was issued for Miller to be held without bond until July 8, 2004 for a Status Hearing. JA. 233-247, 251. That same day, the Honorable Thurman Rhodes of the District Court of Maryland for Prince George's County signed a Recall of Order of Arrest/Summons that recalled the arrest warrant for Daniel Miller. JA. 253.

On June 17, 2004, Miller again appeared in Spotsylvania District Court and charge(s) pursuant to Virginia Code §19.2-100 logged against him on May 29, 2004 by Magistrate Sartori were dismissed. A Release Order was issued and Miller was released. JA. 255. On July 1,

2004, Miller's criminal case number (0E00208635) was entered *nolle prosequi* by Line due to Insufficient Evidence by the Office of the State's Attorney for Prince George's County, Maryland. JA. 258-259, 261. Miller was never in the custody of Defendants County and/or Dougans. JA. 249, 251, 255. Miller sued only Defendants County and Dougans. JA. 657, 675-76.

Defendants petition this Court for review of the Fourth Circuit's denial of qualified immunity to Detective Dougans.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's denial of a police officer's Summary judgment based on qualified immunity is in conflict with *Franks v. Delaware,* 438 U.S. 154 (1978) because the Fourth Circuit went beyond the excision of material false statements alleged in the complaint to find that the warrant affidavit was not support by probable cause and erred by not considering Petitioners argument that the alleged false statement(s) were not material or essential to the probable cause determination.

The Fourth Circuit also erred in its analysis of the second element of the qualified immunity test articulated by this Court in *Saucier v. Katz*, 533 U.S. 194 (2001), when it failed to consider contrary to this Court's decision in *Anderson v. Creighton*, 483 U.S. 635 (1987), that Dougans was entitled to summary judgment on qualified immunity grounds where it was established as a matter of law by a United States District Court Judge that a reasonable officer could have believed Dougans affidavit comported with the Fourth Amendment even though it actually did not. The Fourth Circuit contrary to *Anderson v. Creighton., supra,* did not analyze the actions of Dougans in a more particularized and more relevant sense to determine whether in light of pre-

existing law, it would have been apparent to a reasonable officer that his utilization and reliance on a local criminal computer database that mistakenly identified a "Daniel Miller" as a white male, would result in the mistaken arrest of a black male for a crime, where all facts developed through the officers' investigation identified the suspect as a white male.

This Court should grant certiorari to address these important legal questions.

I. THE FOURTH CIRCUIT MISSAPPLIED THE PRINCIPLES IN *FRANKS V. DELAWARE* BY EXCISING STATEMENTS RESPONDENT DID NOT ALLEGE IN HIS COMPLAINT TO BE MATERIAL FALSE STATEMENTS AND ERRED BY NOT CONSIDERING PETITIONERS ARGUMENT THAT THE ALLEGED FALSE STATEMENTS WERE NOT MATERIAL OR ESSENTIAL TO THE PROBABLE CAUSE DETERMINATION.

Upon an allegation of a false statement contained within an affidavit for probable cause, the rule enunciated in *Franks v. Delaware*, *supra*, required that Miller point out specifically the portion of the warrant affidavit claimed to be false and accompanied by a statement of supporting reasons. *Id.* at 170-172. Next, if the material alleged to be false is set to one side, and there remains sufficient content in the affidavit to support a find of probable cause, then Miller has not proven that the affidavit is lacking in probable cause. *Id.*

This Court articulated in *Franks* that a challenge of deliberate falsehood to a presumptively valid affidavit should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. *Franks v. Delaware*, 438

U.S. 154, 171-172. Miller alleged in paragraph 8 of his complaint that "Defendant John L. Dougans made materially false statements in the application for the warrant to arrest the plaintiff. Dougans stated that Michael Moses had informed him that the tag number of the Jeep in question was 938751. But Moses had not seen the tag and told police so. Dougans stated the he learned the identify of the plaintiff by interviewing the Nickols and other witnesses. In fact, he had not done so, for Nickols and Michael Moses clearly did not identify the plaintiff as the suspect." App. 4d & JA. 10-11.

The Fourth Circuit however, did not like the lower court did, excise *only* the alleged false tag number in an otherwise undisputedly accurate written statement to determine if there remained sufficient content in the warrant affidavit to support a finding of probable cause. The statement at issue read as follows: "The witness Moses recorded the tag number of the vehicle as Maryland 938751M."[10] Under *Franks, supra*, the tag number should have been set to one side, and then the Fourth Circuit needed to determine whether there remained sufficient content in Dougans affidavit to support a finding of probable

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[10] This statement is typed verbatim for the Court as it was included in Dougans affidavit which has been replicated in its entirely on pages 6-7 above. It is undisputed that the eyewitness Moses gave a written statement that stated "I wrote down the tag #." JA. 37. According to eyewitness Moses the white male suspect drove a jeep and the female victim told Dougans that "Daniel Miller" owned a jeep. It is undisputed that Dougans ran the tag number associated with Miller's Identification Inquiry as part of his investigation. However, it is also undisputed that Dougans stated in his affidavit that the tag had been turned into MVA and expired on 3/99. This is consistent with Dougans statement that after he determined the tag number was associated with a black male, he excluded the black male (*i.e.*, Miller) as a suspect. JA. 98-115.

cause that a white male named "Daniel Miller" committed the crime of burglary and theft of a lawnmower.

The Fourth Circuit misapplied the principles of *Franks, supra,* in its reversal and attached great significance to an affidavit from Sgt. Lee, a twenty-fiver year veteran state police officer that contradicted Dougans testimony as to how Dougans claimed he obtained the alleged false tag number. App 6a & 10a. The Fourth Circuit concluded this evidence was uncontradicted by Dougans and thus a reasonable jury could certainly conclude that Dougans affidavit was misleading. App. 13a. Respectfully, this is not the test or standard enunciated by this Court in *Franks, supra.* The Fourth Circuit under *Franks*, was required to determine whether if after excision of an alleged false tag number from an otherwise accurate statement that read "The witness Moses recorded the tag of he vehicle as Maryland 938751M", there remained sufficient content in the warrant affidavit to support a finding of probable cause. The Fourth Circuit did not and erred in not considering Petitioners argument that even if there was a substantial preliminary showing of a false statement, the statements were not essential or necessary to the probable cause determination. The Fourth Circuit's ruling that in light of undisputed expert testimony as to how Dougans obtained the warrant should be left for the jury to decide whether the warrant affidavit was misleading is contrary to the principles set forth in *Frank, supra.* Such a ruling forecloses the grant of qualified immunity to police officers where there is no *material dispute* of fact, but rather a dispute as to *how* an officer may have conducted *part* of his investigation. A reading of Dougans affidavit *without* the alleged false tag number clearly contained sufficient content to support a finding of probable cause that a white male named "Daniel Miller" committed the crime of second degree burglary and theft of a lawnmower.

Next, Miller alleged that Dougans identified him (Miller) as the Defendant in his affidavit as the person who committed the crimes. In *Franks, supra*, this Court indicated that..."the Fourth Amendment demands a factual showing sufficient to comprise probable cause, the obvious assumption is that there will be a truthful showing. This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Id.* at 164-165. It is undisputed under the above facts that Dougans investigation developed a *white male* named "Daniel Miller" as the suspect for the burglary and theft, *not a black male*. It is also undisputed that Dougans reference to "the Defendant" in his warrant affidavit was that of a *white male* not "the Plaintiff" a *black male*. Under *Franks, supra*, surely Dougans was "truthful" in the sense that the information he put forth was believed or appropriately accepted by him as true in light of all the facts. *Id.* at 164-165. Although, it is now known that Dougans mistakenly believed he had used the Identification Inquiry of a white male, when in fact it was that of Miller, a black male, it cannot be said Dougans warrant affidavit was so lacking in indicia of probable cause as to render his belief in its existence unreasonable.

It is undisputed that Miller's identifiers were included in Dougans affidavit, it is also undisputed that Dougans put forth on his affidavit, statement of charges and arrest warrant the last known address of 9004 Woodyard Road, Clinton, Maryland, which was the last known address of the *actual* white male suspect named "Daniel Miller," as the defendant in the burglary and theft of the lawnmower. JA. 29, 31 & 33. Dougans did not include Miller's address of Spottsylvania County, Virginia. This is significant for three reasons. First,

it supports Dougans belief in probable cause that had identified the right person, *i.e.*, a white male suspect named "Daniel Miller," for the burglary and theft of the lawnmower. Second, on Dougans affidavit, he also included a Maryland telephone number (301) 877-7509, following the last known Maryland address of the *white* male suspect, which negates Miller's contention that Dougans intended to mislead the Commissioner into issuing an arrest warrant for him, a black male, who resided in Spottsylvania County, Virginia. Third, Miller alleged in his Complaint that Dougans knew he lived in Spottsylvania County. However, Dougans affidavit, statement of charges and arrest warrant had a Maryland address of 9004 Woodyard Road, Clinton, Maryland. App. 4d & JA. 33. Again, even after excision of alleged false statements by Dougans, there remained sufficient content in his warrant affidavit to support a finding of probable cause.

Notwithstanding the above, the Fourth Circuit concluded that taking the evidence in light most favorable to Miller, a reasonable jury could certainly conclude that the affidavit submitted by Dougans contained deliberate misrepresentations and omissions that were material and if stripped of (*i.e.*, his birthdate, height, weight, and driver's license number), would have asked the magistrate to issue a warrant for the arrest of a white suspect, named Daniel Miller, and would have omitted all information pertaining to Miller. App. 13a. Respectfully, this is not a function for the jury, but one for the court, as stated in *Franks, supra*. The Fourth Circuit contrary to *Franks, supra*, concluded that the corrected affidavit, (*i.e.*, stripped of Miller's identifiers) would not have provided probable cause to arrest Miller. App. 13a.

Petitioners submit that the question is not whether the affidavit stripped of the Miller's identifiers would have provided probable cause to *arrest Miller*. Rather, the question is whether, the affidavit stripped of Miller's

identifiers; there existed sufficient content in the warrant affidavit to support a finding of probable cause to arrest a white male named "Daniel Miller." Ironically, even the Fourth Circuit concluded at App. 13a, that if after the excision of Dougans misrepresentations, there remained sufficient content in the warrant affidavit to ask the magistrate to issue a warrant for the arrest of a *white suspect named Daniel Miller*. Therefore, the Fourth Circuit erred when it misapplied the principles set forth in *Franks, supra*, by ruling that there did not remain sufficient content in Dougans affidavit to support a finding of probable cause to arrest a white male named "Daniel Miller." [11]

Petitioners submit that after the fact, not every fact recited in the warrant affidavit was necessarily correct. It is now clear that the "Daniel Miller" Dougans believed or appropriately accepted by him to be that of a white male suspect identified by the victim of the crime, was entered in to a local computer database erroneously as a white male, which at the same time contained identifiers of Miller, a black male. To accept the Fourth Circuit's conclusion that Dougans *intentionally* utilized Miller's information to obtain an arrest warrant from the Commissioner to arrest Miller, this Court would have to assume in light of all the facts gathered by Dougans through his investigation that the suspect was a white male bearing the name "Daniel Miller"; Dougans would have had to know that the information put forth on January 22, 2003 to the Commisioner was actually for a black male. And knowing this, Dougans would deliberately mislead the Commissiner into thinking he is actually issuing

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[11] The Fourth Circuit's published opinion has already been used as authority in opposition to other municipality's summary judgment for the proposition that once an allegation of material false statements have been plead, the trial judge must deny summary judgment because the question of whether the affidavit was misleading or lacked probable cause must be decided by the jury.

a warrant for a white male, when in fact, Dougans sinister intent all along was to have a black male, who resided in Spottsylvania County, Virginia, arrested for a crime committed by a white male. Petitioners submit that the Fourth Circuit's excision of more than the alleged false tag number, expanded the rule in *Franks, supra*, by excising allegations that were at best negligence on the part of Dougans to further conclude it is for a jury to determine if after excision, there is probable cause in a warrant affidavit, which is precisely contrary to this Court's ruling in *Franks supra*, where the Court stated that "allegations of negligence or innocent mistake are insufficient" to warrant a *Franks* violation. *Id.* at 171-172.

a) The Fourth Circuit Did Not Consider Petitioners Argument That Alleged False Statements Were *Not* Material Or Essential To The Determination Of Probable Cause.

The Fourth Circuit in its opinion stated that "in support of his claim for qualified immunity, Dougans does *not* argue that these misrepresentations and omissions are immaterial. Nor does he contend that, if deliberately or recklessly made, they would not violate Plaintiff's constitutional rights." App. 11a. Petitioners are *compelled* to inform this Court that not only was this the main argument fully made at the United States District Court before Judge Roger W. Titus, it was also *re-argued* as Petitioners main argument in its Brief to the Fourth Circuit. Petitioners have reproduced for this Court as Appendix E, its relevant argument section of the Brief submitted to the Fourth Circuit.

The Fourth Circuit's failure to consider Petitioners argument has legal significance to the Petitioners for two reasons. First, this Court must be aware that Petitioners specifically argued that even assuming Dougans included the

alleged false tag number or statements in his affidavit, it was not material, essential or necessary to the probable cause determination that a white male named "Daniel Miller" committed the crime of burglary and theft of a lawnmower. App. 5e-6e. Second, if the Fourth Circuit did not consider the argument, as it clearly indicated in its published opinion, App. 11a, such lack of consideration of Petitioners argument is contrary to this Court decision in *Anderson v. Creighton*, where in this Court similarly remanded that case for further proceedings where the court failed to consider Petitioners argument. *Id.* at 640-641. Respectfully, Petitioners request that this Court vacate the judgment of the Fourth Circuit and remand the matter for further proceedings to consider Petitioners argument of immateriality in its defense of qualified immunity.

b) The United States District Court Judge's Probable Cause Determination Is More Stringent Than Is The Requirement For Qualified Immunity And The Fourth Circuit's Decision In Effect Labeled Judge Titus' Probable Cause Determination *Unreasonable.*

While the Petitioners are fully aware that a grant of summary judgment at the United States District Court for Maryland is subject to an appeal to the Fourth Circuit, Petitioners submit that the Fourth Circuit's failure to, and/or disregard of the trial judge's determination of probable cause after Respondent fully litigated his allegations of material false statements, is contrary to American jurisprudence in determining qualified immunity and renders moot the judicial function of a trial judge's determination of a fact-specific inquiry into and of probable cause.

The Honorable Roger W. Titus, of the United States District Court of Maryland assessed Respondents alleged false statements found that 1) Dougans actions were

reasonable 2) Miller did not make a substantial preliminary showing that Dougans knowingly and intentionally, or with reckless disregard for the truth, included information in his application for the warrant, 3) the alleged falseinformation was not essential to the probable cause determination because the probable cause determination was based on Dougans correct reporting to the magistrate that the white male identified as Daniel Miller was the person who had stolen the lawnmower and 4) Dougans was entitled to qualified immunity. App. 28c-36c.

The late Chief Justice William Rehnquist, joined by then Chief Justice Burger, dissented in *Franks, supra*, and cautioned against such a reversal by the Fourth Circuit. Justice Rehnquist voiced his concern that "a full-dressed adversary proceeding is undoubtedly a better vehicle than an *ex parte* proceeding for arriving at the truth of any particular inquiry, but is scarcely a guarantee of truth." *Id.* 185-186. To make his point, Justice Rehnquist, quoted Justice Jackson in *Brown v. Allen* 344 U.S. 443, 540 (1953), who said that..."reversal by a higher court is not proof that justice is thereby done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Id.* at 185-186. Justice Rehnquist went on to say "the same is surely true of a judge's review of the factual determinations of a magistrate; a larger percent of the judge's findings as to the truth of an affiant's statement may be objectively correct that the percentage of the magistrate's determinations which are, but neither one is going to be 100 percent." *Id.*

The significance of Justice Rehnquist dissent today is that; after this Court's ruling in *Franks* that allowed the review of the magistrate's probable cause determination by a trial judge of an affiant's statements in the issuance of a

warrant based on *subsequent* allegations of falsity by the affiant, the Fourth Circuit has engaged in yet another review of United States District Court Judge Roger W. Titus's fact specific inquiry into the probable cause determination, which is a more stringent standard necessary for the entitlement of qualified immunity as previously held by the Fourth Circuit.[12] To paraphrase and echo the words of the late Justice Rehnquist; Petitioners submit the public policy concern is that the Fourth Circuit's re-review of Judge Titus' probable cause determination will not refrain lawyers from constant relitigation, whether in the form of collateral attack, appeal, retrial, or whatever, of issues that have been decided by a competent authority. *Franks, supra*, at 183. Respectfully, in the interest of public policy, Petitioners would ask that this Court reverse and remand the Fourth Circuit's decision with directions to give substantial weight to Judge Titus's probable cause determination and affirm the lower court's decision unless Judge Titus' abused his discretion.

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[12] In *Torchinsky v.Siwinski*, 942 F.2d 257, 260-262 (4th Cir. 994), the Fourth Circuit stated that it was noteworthy that two different judicial officers in separate proceedings determined the officer had demonstrated probable cause. The Fourth Circuit stated that in its view the officers actions in seeking an arrest warrant and the magistrate's determination of probable cause provide additional support for his claim that he acted with objective reasonableness. Also, the standard for probable cause, as we have indicated, is more stringent than is the requirement for qualified immunity.

II. THE FOURTH CIRCUIT ERRED AFTER FINDIING A FOURTH AMENDMENT VIOLATION, BY REFUSING TO CONSIDER AN OFFICER'S ENTITLEMENT TO QUALIFIED IMMUNITY BECAUSE IT WAS NOT APPARENT IN LIGHT OF PRE-EXISTING LAW, THAT AN OFFICER WHO UTILIZED A COMPUTER DATATBASE AND OBTAINED A MATCH OF A WHITE MALE SUSPECT'S FIRST AND LAST NAME GIVEN TO HIM BY THE VICTIM OF A CRIME TO APPLY FOR A FACIALLY VALID WARRANT, WOULD HAVE KNOWN AT THE TIME THE COMPUTER DATA ERRONEOUSLY IDENTIFIED A BLACK MALE WITH THE SAME FIRST AND LAST NAME AS THAT OF THE ALLEGED WHITE MALE SUSPECT, WHICH SUBSEQUENTLY WOULD CAUSE THE MISTAKEN ARREST OF THE BLACK MALE.

The Fourth Circuit's discussion of qualified immunity is in conflict with this Court's decision in *Anderson v. Creighton*, 483 U.S. 635, because it was nothing more than a general right that Dougans was alleged to have violated, *i.e.*, it was clearly established that Dougans affidavit not supported by probable violated the Fourth Amendment, therefore his actions were objectively legally unreasonable. *Id.* at 640-641. This Court in *Anderson, supra*, stated that "we have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Id.*, citing from *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986). Petitioners specifically argued that whether a Fourth Amendment

violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken. App. 1e-8e. As such, Petitioners respectfully request that this Court, as it did in *Anderson, supra*, permit Dougans to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing an affidavit for an arrest warrant, he could, as a matter of law, reasonably have believed that his affidavit for an arrest warrant was lawful. *Id.*

As mentioned above, it is undisputed that Dougans utilized a local computer to conduct a name search of the name "Daniel Miller," as the alleged suspect given to him by the female victim of the crime, who drove a jeep. As a result of conducting the search, Dougans received a match, *albeit a mistaken one*, for a white male with the name "Daniel Miller." Dougans also knew that the alleged suspect's father's name was Daniel Paul Miller. Believing that he had the properly identified the suspect through a local criminal computer search, Dougans applied for an arrest warrant. JA. 50, 425-26. Also, it is undisputed that Dougans affidavit included the alleged *white male* suspect's Maryland telephone number (301) 877-7509, following the last known Maryland address of the *white* male suspect. Further, it is undisputed that Dougans probable cause determination that a white male named "Daniel Miller" had committed the burglary and theft was based in fact on an eyewitness statement that a white male in a jeep was seen at the scene of the crime hauling away the lawnmower, and the female victim's statement that "Daniel Miller" is a white male who owns a jeep.

This Court in *Anderson, supra*, has held that the right the official is alleged to have violated must have been clearly established in a more particularized and hence more relevant sense. That is, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.* at 640. Therefore, the Fourth Circuit erred in its failure to consider Dougans actions in a more particularized and hence more relevant sense. That is, it could not have been sufficiently clear that Dougans or a reasonable official's reliance (albeit mistakenly) on a match from a local criminal computer database of the first and last name of an alleged white male suspect named "Daniel Miller," would have understood his reliance on such data erroneously entered unbeknownst to them at the time would violate the constitutional rights of a black male, who has the same first and last name.

This Court in *Anderson, supra*, stated that "we have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Id.*, citing from *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986). Under the above facts, Dougans reasonably believed that he was acting lawful. As it turns out, Dougans reasonably but mistakenly concluded that the Identification Inquiry he relied on gave him the probable cause required to seek an arrest warrant for the white male suspect with the same first and last name as Miller, a black male.

Therefore, the Fourth Circuit should have considered that it was not clearly established that the circumstances with which Dougans was confronted did not constitute probable cause or objective reasonableness. Petitioners respectfully

request that this Court vacate the judgment of the Fourth Circuit and remand for further proceedings.

CONCLUSION

For the foregoing reasons, Petitioners Prince George's County, Maryland and Detective John L. Dougans requests this Honorable Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DANIEL ANTHONY MILLER,

Plaintiff-Appellant,

v.

No. 05-2250

PRINCE GEORGE'S COUNTY, MARYLAND, A Body Corporate and Politic; JOHN L. DOUGANS,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Roger W. Titus, District Judge.

(CA-05-292-RWT)

Argued: October 26, 2006

Decided: January 22, 2007

Before MICHAEL, MOTZ, and KING, Circuit Judges. Affirmed in part and reversed in part by published opinion. Judge Motz wrote the opinion, in which Judge Michael and Judge King joined.

COUNSEL

ARGUED: Terrell N. Roberts, III, ROBERTS & WOOD, Riverdale, Maryland, for Appellant. Rajeshanand Kumar, OFFICE OF LAW FOR PRINCE GEORGE'S COUNTY, Upper Marlboro, Maryland, for Appellees.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Daniel Anthony Miller, an African-American male, brings this civil rights action against Prince George's County, Maryland, and one of its police officers, Detective John L. Dougans. Miller alleges that Det. Dougans violated the Fourth Amendment by deliberately or recklessly making material false statements and omissions on a warrant affidavit, ultimately resulting in Miller's arrest without probable cause and imprisonment for an offense Miller never committed. The district court granted summary judgment to the County and Det. Dougans. For the reasons herein, we affirm in part and reverse in part.

I.

On July 23, 2002, Jeffrey and Jessica Nichols reported the theft of their lawnmower to the Prince George's County Police Department, which assigned Det. Dougans to investigate the case.[1]

Two days later, Det. Dougans began his investigation. He interviewed and obtained a statement from the victim, Mrs.

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[1]As we must, in reviewing this grant of summary judgment, we consider the facts in the light most favorable to the non-moving party, here Miller. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Nichols. She told the detective that her neighbor, Michael Moses, reported seeing a green Jeep with light wood paneling in the neighborhood at about 1:30 a.m. in the early morning of July 23, just hours before the theft was discovered. This vehicle contained two individuals — "a skinny white guy and a girl." The Jeep, accompanied by a gold truck, circled the area about fifteen times. During the last lap, one of the vehicles pulled a wooden trailer containing what Moses later surmised was the stolen lawnmower. Based upon this information, Mrs. Nichols suspected that the thief was Daniel Miller, a young white man whom she had heard was on a stealing spree and she knew owned a green Jeep with light wood paneling. Mrs. Nichols believed that her lawnmower might be located at 9004 Woodyard Road in Clinton, Maryland, where Daniel sometimes stayed with his sister, Megan, and her boyfriend, Robert Frederick Owens. Mrs. Nichols told Det. Dougans that she had reported all of this information to the police shortly after the theft. As a result, the police had recovered the stolen lawnmower from the house at 9004 Woodyard Road on the same day as the theft, but had made no arrests.

A week after speaking with Mrs. Nichols, Det. Dougans interviewed Megan Miller and Owens. In a written statement Megan denied all knowledge of the lawnmower. The 17-year-old Megan did tell Det. Dougans that she had a brother, Daniel, who was "a little older" than she. Megan's boyfriend, Owens, similarly denied any involvement in the theft; he maintained that the police had found the lawnmower at his house because he had purchased it from a "crackhead" who delivered it to him. Although Mrs. Nichols had identified a young white Daniel Miller as a suspect in the theft, Det. Dougans did not ask Megan or Owens where Megan's young white brother, Daniel, could be located.

On August 13, Det. Dougans conducted his final interview, obtaining a statement from the Nichols's neighbor,

Michael Moses, in which Moses echoed the information about the "skinny white male" he had seen, who was "no older than 25" years old. In his statement, Moses also noted that he "wrote down the [license plate] tag [number]" of the Jeep on the night of the theft.[2] When asked about this at deposition, Moses testified that, in fact, he did not remember writing down a license plate tag number, but if he had, he would have given it to Mr. and Mrs. Nichols when the theft was discovered rather than keeping it for more than two weeks until Det. Dougans came around to investigate.

Det. Dougans also conducted three types of computer searches to investigate the theft. First, he searched the local criminal database using the name "Miller" or "Daniel Miller." This query produced the records for several Daniel Millers, including the Plaintiff. Plaintiff's record correctly set forth his height, weight, his 8/29/67 birthdate (meaning he was almost 35 at the time of the theft), and his driver's license number, M460135067673; the record also incorrectly noted his race as white. Det. Dougans then used Plaintiff's driver's license number, M460135067673, to search the state motor vehicle database. That search again retrieved Plaintiff's height, weight, and 8/29/67 birthdate, but correctly noted his race as black.

The retrieved record additionally stated that Plaintiff had no current license plate tag, but had once owned a Jeep, and three years earlier — in 1999 — had turned in the expired license plate tag (938751M) for the Jeep to the Maryland

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[2]Moses's police statement does not, however, contain a tag number. Det. Dougans acknowledged that he had erred in not having Moses include the tag number in the statement, but insisted that Moses gave him a slip of paper on which the tag number was written, and that Det. Dougans had placed that slip of paper in the case file. However, when examined, the case file contained no slip of paper of any sort.

Motor Vehicle Administration (MVA). (Plaintiff submitted unrebutted evidence that tags turned in to the MVA are retained in a locked cabinet until destroyed.) Det. Dougans did not initiate any computer search using Plaintiff's expired tag number (938751M), and thus established *no* link between this tag number and the purported getaway car or the white suspect. Moreover, Det. Dougans searched the state criminal database for a white Daniel Miller with Plaintiff's 8/29/67 date of birth and did *not* retrieve a match.

Apparently no further investigative activity of any kind took place. Nevertheless, five months later on January 22, 2003, Det. Dougans filed an affidavit in support of an application for charges against a Daniel Anthony Miller, identifying him as a white male with Plaintiff's birthdate, height, weight, and driver's license number; the affidavit also linked the expired vehicle tag (938751M) once belonging to Plaintiff to the white suspect's getaway car. In his affidavit, Det. Dougans set forth the following as the basis for his probable cause to believe that the subject of the warrant stole the lawnmower and thus committed theft and second-degree burglary:

> During the victim's [Mrs. Nichols's] inquiry, they [sic] learned from witness Michael MOSES that a green Cherokee, driven by a white male had been observed by the witness MOSES pulling out of the victim's residence with a wooden trailer attached to the mentioned green Cherokee haling [sic] the victim's Griffin Lawnmower away. The witness Moses recorded the tag of the vehicle as Maryland 938751M. The investigation into the mentioned tag.[3] revealed they [sic] had allegedly been turned

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[3]Det. Dougans similarly stated in deposition that he had obtained the information about Plaintiff by initiating a computer

> into MVA and expired 3/99. The identity of the defendant MILLER was obtained interviewing the victims and witness. . . . The Co-Defendant Owens is the boy-friend of the Defendant Miller [sic] sister, whom [sic] is a juvenile (17-years old). The jeep [sic] Cherokee is the property of Defendant Miller, witness advised it was the same vehicle seen by him driving out of the driveway of victim Nichols [sic] residence. This Detective has attepted [sic] to make contact with Defendant Miller, but as of this date has been unable, due to Defendant staying at several different addresses throughout the county.

Based on this affidavit, the magistrate issued a warrant on the same day. There is no evidence that Det. Dougans ever attempted to serve the warrant on a Daniel Miller or otherwise attempted to find a Daniel Miller.

On May 29, 2004, Virginia State Trooper Rodney Ward stopped Plaintiff because his vehicle lacked a front tag. During a routine Department of Motor Vehicles check, Trooper Ward discovered the outstanding Maryland warrant

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search using a motor vehicle tag number 938751M, assertedly given to him by Michael Moses. But Sergeant Duane Lee, a twenty-five year veteran officer employed by the records section of the state police, testified without contradiction that the computer records simply did *not* support Det. Dougans's testimony. Subpoenaed to produce all computer records relating to this investigation during the relevant time frame, Sgt. Lee undertook a comprehensive system search. He testified unequivocally that he found no evidence that any database had ever been searched using the tag number 938751M, contrary to Det. Dougans's testimony that he had used this number to initiate the computer search after obtaining it from Moses. Sgt. Lee opined that Det. Dougans, in fact, had obtained the tag number in the manner set forth in text above, i.e. only as part of the records for a *black* male.

for theft and second-degree burglary and took Plaintiff into custody. The warrant issued pursuant to Det. Dougans's affidavit thus caused the trooper to arrest the 37-year-old African-American Plaintiff for a crime Det. Dougans indisputably believed had been committed by a much younger white man.

While the warrant specified that the wanted individual was a white male, Trooper Ward testified that because the date of birth, hair and eye color, weight, height and full name of the individual wanted in Maryland matched the individual he had just stopped, he believed that he had arrested the suspect described in the warrant. The only information that did not match was the suspect's reported race. Plaintiff was held in prison in Virginia for a total of nineteen days on the warrant that Det. Dougans had obtained. On June 17, 2004, police cleared him of the charges and released him.

In February of 2005, Plaintiff initiated this action under 42 U.S.C. § 1983 and Maryland law, bringing constitutional and common law claims against Det. Dougans, and common law claims against the County. The district court concluded that Det. Dougans's actions did not violate Plaintiff's federal or state constitutional rights and that, even if they did, Det. Dougans was entitled to qualified immunity with respect to the federal constitutional claims. The court further held that Plaintiff's state law false arrest claims against Det. Dougans and the County failed because Det. Dougans was not the arresting officer, and that his malicious prosecution claims failed because Det. Dougans's affidavit provided probable cause for issuance of the arrest warrant. Accordingly, the court granted summary judgment to Det. Dougans and the County on all counts. Plaintiff timely appealed.

II.

When a law enforcement officer asserts that qualified immunity protects him from liability for a federal constitutional violation, as Det. Dougans does here, a court must consider two questions. First, we must determine, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Only if the answer is "yes" do we advance to "the next, sequential step," which is "to ask whether the right asserted was clearly established" at the time of the events at issue. *Id.* We conduct this latter inquiry by determining whether a reasonable officer would have understood that his conduct violated the asserted right. *Id.* at 202. "[T]he answer to both *Saucier* questions must be in the affirmative in order for a plaintiff to defeat a defendant police officer's motion for summary judgment on qualified immunity grounds." *Clem v. Corbeau*, 284 F.3d 543, 549 (4th Cir. 2002).

A.

We turn first to the initial *Saucier* question: whether, taking the facts "in the light most favorable" to Plaintiff Miller, "the facts alleged show" that Det. Dougans's "conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. Plaintiff maintains that the facts outlined above, considered in the light most favorable to him, allege a claim that he was seized without probable cause in violation of his Fourth Amendment rights. Unquestionably, "[t]he Fourth Amendment prohibits law enforcement officers from making unreasonable seizures, and seizure of an individual effected without probable cause is unreasonable." *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996); *see Malley v. Briggs*, 475 U.S. 335 (1986); *Franks v. Delaware*, 438 U.S. 154 (1978). Plaintiff acknowledges that he was arrested

pursuant to a warrant, but claims that the warrant was not supported by probable cause. A plaintiff's allegations that police seized him "pursuant to legal process that was not supported by probable cause and that the criminal proceedings terminated in his favor are sufficient to state a . . . claim alleging a seizure that was violative of the Fourth Amendment." *Brooks*, 85 F.3d at 183-84.

Plaintiff Miller alleges here that his seizure was unreasonable because it followed from a warrant affidavit that was deficient because it was dishonest. To succeed on his claim, Plaintiff must prove that Det. Dougans deliberately or with a "reckless disregard for the truth" made material false statements in his affidavit, *Franks*, 438 U.S. at 171, or omitted from that affidavit "material facts with the intent to make, or with reckless disregard of whether they thereby made, the affidavit misleading." *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (internal quotation marks omitted).

"Reckless disregard" can be established by evidence that an officer acted "with a high degree of awareness of [a statement's] probable falsity," that is, "when viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000)(internal quotation marks omitted); *see also*, *Forest v. Pawtucket Police Dept.*, 377 F.3d 52, 58 (1st Cir. 2004); *United States v. Clapp*, 46 F.3d 795, 801 n.6 (8th Cir. 1995). With respect to omissions, "reckless disregard" can be established by evidence that a police officer "failed to inform the judicial officer of facts [he] knew would negate probable cause." *Beauchamp v. City of Noblesville, Inc.*, 320 F.3d 733, 743 (7th Cir. 2003); *see also Wilson*, 212 F.3d at 788; *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993). A plaintiff's "allegations of negligence or innocent mistake" by a police officer will *not*

provide a basis for a constitutional violation. *Franks*, 438 U.S. at 171.

Moreover, in order to violate the Constitution, the false statements or omissions must be "material," that is, "necessary to the [neutral and disinterested magistrate's] finding of probable cause." *Id.* at 155-56. To determine materiality, a court must "excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the 'corrected' warrant affidavit would establish probable cause." *Wilson*, 212 F.3d at 789; *see also Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004). If the "corrected" warrant affidavit establishes probable cause, no civil liability lies against the officer.

Plaintiff Miller maintains that in the arrest affidavit Det. Dougans intentionally listed Plaintiff's birthdate, height, weight, driver's license number and vehicle tag number as those of a white man suspected of committing the burglary, when Det. Dougans knew (or recklessly disregarded the fact) that this information identified the Plaintiff, an African-American man never suspected of committing the burglary. Plaintiff also asserts that Det. Dougans, intentionally or with reckless disregard for the truth, omitted from his affidavit the source of the information about Plaintiff's birthdate, height, weight, and driver's license number — never stating that all of this information was obtained from the computer records of an African-American, who could not be the white suspect.

Moreover, Plaintiff asserts that in his affidavit Det. Dougans deliberately, or with reckless disregard for the truth, misrepresented information about Plaintiff's license plate tag number by stating that an eyewitness to the burglary supplied the number as that of the getaway car driven by the white suspect, when actually Det. Dougans had obtained the tag number from the computer records of the African-American

Plaintiff and had established *no* link between that number and the getaway car or the white suspect. Further, Plaintiff maintains that Det. Dougans deliberately, or with reckless disregard for the truth, omitted from the warrant affidavit the fact that he had searched the state criminal database for a white male with Plaintiff's birthdate and retrieved *no* match. Plaintiff contends that these misrepresentations and omissions were material; that is, a corrected affidavit — one without the misrepresentations and including the omissions — would not have provided probable cause to arrest him.

In support of his claim of qualified immunity, Det. Dougans does *not* argue that these misrepresentations and omissions are immaterial. Nor does he contend that, if deliberately or recklessly made, they would not violate Plaintiff's constitutional rights. Instead, Det. Dougans offers several singularly unpersuasive theories as to why we should nonetheless hold that the facts Plaintiff has alleged fail to assert the violation of a constitutional right.

First, and principally, Det. Dougans simply disputes the facts, arguing that Plaintiff's account of the facts is incorrect. The detective stoutly maintains that he did *not* "present [ ] false statements in his affidavit." Brief of Appellee at 6. For example, Det. Dougans claims that, as he stated in his affidavit, he *did* conduct a computer search using the license plate tag number that eyewitness Michael Moses told him was on the getaway car, despite the fact that Sgt. Lee testified that no record of such a computer search exists. Perhaps Det. Dougans may ultimately persuade a factfinder, but this argument cannot prevail on summary judgment, for at this stage we do not find facts. Rather, with respect to any factual dispute, we must take the facts in the "light most favorable to the party asserting the injury," i.e. Plaintiff. *Saucier*, 533 U.S. at 201.

In connection with his argument about the facts, Det. Dougans further contends that Plaintiff has offered no evidentiary support for his allegations and that Plaintiff's "entire argument is based upon mischaracterizations and conjecture." Brief of Appellee at 6. These words better describe Det. Dougans's account of the facts than Plaintiff's. For, in support of his claim, Plaintiff offers powerful evidence making a "substantial preliminary showing" of a constitutional violation. *See Franks*, 438 U.S. at 155. Plaintiff proffers the testimony of Sgt. Duane Lee, a police officer with twenty-five years of experience, who is still employed by the Maryland State Police. After a thorough investigation of law enforcement computer records, Sgt. Lee concluded that Det. Dougans had obtained the identifying information listed on the warrant affidavit in connection with the records of a black man, not a white man; that the error as to race that occurred in Det. Dougans's initial computer search was corrected in his subsequent searches; that *no* link was ever established between Plaintiff's vehicle tag number and the purported getaway car or the white suspect; and that a computer search of the state criminal database for a white Daniel Miller with Plaintiff's 8/27/67 birthdate retrieved *no* match.

Not only is this evidence powerful, to date it is both undisputed and corroborated. On one hand, Det. Dougans, apart from his own self-serving testimony, has proffered no expert opinion or other evidence to rebut it. On the other, Plaintiff points to corroborating evidence, including the absence of any vehicle tag number in Det. Dougans's police file and eyewitness Moses's deposition testimony that he did not remember writing down the getaway car tag number but, if he had done so, he would have given it to the victims on the day of the theft, rather than to Det. Dougans two weeks later.

Taking this evidence in the light most favorable to Plaintiff, a reasonable jury could certainly conclude that the affidavit submitted by Det. Dougans contained misrepresentations and omissions made deliberately or with reckless disregard for "whether they thereby made[ ] the affidavit misleading." *Colkley*, 899 F.2d at 300 (internal quotation marks omitted); *see also Franks*, 438 U.S. at 164. Additionally, the evidence in the light most favorable to Plaintiff would support a finding that Det. Dougans "when viewing all the evidence . . . must have entertained serious doubts as to . . . the accuracy of the information he reported." *Wilson*, 212 F.3d at 788 (internal quotation marks omitted). Furthermore, the misrepresentations and omissions are material; an affidavit containing the omitted material and stripped of all misrepresentations would have asked the magistrate to issue a warrant for the arrest of a white suspect, named Daniel Miller, and would have omitted all information pertaining to Plaintiff. The "corrected" affidavit would not have provided probable cause, "in light of all the evidence," to arrest Plaintiff. *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004). Nor would a warrant, stripped of this identifying information, have been executed against Plaintiff.

In addition to disputing the facts, Det. Dougans unconvincingly argues that because he subjectively intended that a white suspect be seized rather than the African-American Plaintiff, he did not violate Plaintiff's Fourth Amendment rights. His argument is foreclosed by the very cases on which he relies. *See Brower v. County of Inyo*, 489 U.S. 593 (1989); *Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991). In *Brower*, the Supreme Court carefully explained that "[a] seizure occurs even when an unintended person or thing is the object of the detention or taking" so long as the detention is "willful," meaning "a governmental termination of freedom of movement *through means intentionally applied*." *Brower*, 489 U.S. at 596-97. The fact that the seized individual is mistakenly thought to be another

does not mean that the innocent individual has not been seized. Indeed, as we held in *Rucker*, "a fourth amendment seizure may occur notwithstanding that the person restrained was mistakenly thought to be another, because he nevertheless is the intended object of the specific act of physical restraint." 946 F.2d at 281.

Nor, contrary to Det. Dougans's contentions, does the fact that he was not the arresting officer eliminate his responsibility for the natural consequences of his use of intentionally or recklessly false material misstatements and omissions to obtain the arrest warrant. As the First Circuit explained in recently rejecting a similar argument, "a police defendant who acts intentionally or with reckless disregard for the truth may not insulate himself from liability through the objectively reasonable conduct of other officers." *Burke v. Town of Walpole*, 405 F.3d 66, 86 (1st Cir. 2005). That Trooper Ward actually arrested Plaintiff does not free Det. Dougans from constitutional responsibility for Det. Dougans's own acts. *See id.* Just as a police officer cannot "obtain a warrant on the basis of a 'bare bones' affidavit" and then shield himself from liability by relying on the fact that the officers who execute the warrant are "ignorant of the circumstances under which the warrant was obtained," *see United States v. Leon*, 468 U.S. 897, 923 n.24 (1984), Det. Dougans cannot falsely obtain a warrant without probable cause and then shield himself from liability by relying on the fact that Trooper Ward, who executed the warrant, was ignorant "of the circumstances under which the warrant was obtained."

We recognize, of course, that "[n]ot every mix-up in issuance of an arrest warrant . . . automatically constitutes a constitutional violation for which a remedy may be sought." *Thompson v. Prince William County*, 753 F.2d 363 (4th Cir.

1985).[4] It is also plain that an officer is not required to "exhaust every potentially exculpatory lead or resolve every doubt about a suspect's guilt before probable cause is established." *Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991). However, the Supreme Court has made equally clear that police officers cannot intentionally lie in warrant affidavits, or recklessly include or exclude material information known to them. *See Malley*, 475 U.S. at 344-45; *Leon*, 468 U.S. at 922-23; *Franks*, 438 U.S. at 155-56. An investigation need not be perfect, but an officer who intentionally or recklessly puts lies before a magistrate, or hides facts from him, violates the Constitution unless the untainted facts themselves provide probable cause. Here, they did not.

Of course, jurors may ultimately choose not to credit Plaintiff's evidence, but he has satisfied the first element of the *Saucier* analysis — proffering evidence of the violation of his constitutional right under the Fourth Amendment to be free from seizure without probable cause.[5]

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[4]Det. Dougans attempts to rely on *Thompson* and other mistaken identity cases in which courts have found police officers did not violate the Constitution. These cases, however, do not aid Det. Dougans, for they all involve police officers who reasonably mistake an innocent party for the suspect sought in either applying for or executing a *properly obtained warrant*. None involve allegations, like those here, of an officer who makes deliberately or recklessly false material misrepresentations or omissions to obtain a warrant, for which there would otherwise be no probable cause.

[5]As the parties agree, Plaintiff's state constitutional claims under Articles 24 and 26 of the Maryland Declaration of Rights are construed *in pari materia* to his Fourth Amendment claim. *See Pickett v. Sears, Roebuck & Co.*, 775 A.2d 1218, 1224 (Md. 2001). Moreover, Maryland recognizes no immunity for officials committing state constitutional violations. *See DiPino v. Davis*, 729 A.2d 354, 371 (Md. 1999). Therefore, our holding that

B.

Accordingly, we turn to the second element of *Saucier* — whether the violated right was clearly established at the time of the events in question. If the right was not clearly established, Det. Dougans still enjoys qualified immunity from liability on this claim.

Qualified immunity "operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier*, 533 U.S. at 206). For a constitutional right to be clearly established, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (internal quotation marks omitted). The "salient question" is whether "the state of the law" at the time of the asserted constitutional violation gave

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Plaintiff has proffered evidence of a violation of his Fourth Amendment rights requires that we reverse the grant of summary judgment to Det. Dougans on Plaintiff's state constitutional claims. Moreover, since our holding as to Plaintiff's constitutional claims rests on a conclusion that Det. Dougans's affidavit would not (stripped of material false statements and omissions) establish probable cause, we must also reverse the grant of summary judgment to Det. Dougans and the County on Plaintiff's malicious prosecution claims. *See Exxon Corp. v. Kelly*, 381 A.2d 1146, 1149 (Md. 1978); *see also DiPino*, 729 A.2d at 374 (noting malice element of tort may be inferred from a lack of probable cause). However, as the district court held, under Maryland law a false arrest claim will not lie against one wrongfully obtaining a warrant when that individual is not the detaining officer and the detaining officer arrests pursuant to a facially valid warrant. *Montgomery Ward v. Wilson*, 664 A.2d 916, 927 (Md. 1995); *see also Lewin v. Uzuber*, 4 A. 285, 289 (Md. 1886). Thus, we affirm the district court's grant of summary judgment to Det. Dougans and the County on Plaintiff's state law false arrest claim.

Det. Dougans "fair warning" that his alleged conduct was unconstitutional. *Id.* at 741. Although earlier cases involving "fundamentally similar" or "materially similar" facts are "not necessary to such finding," *id.*, in the case at hand, prior case law with "fundamentally similar" facts is abundant.

As explained above, the Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or "with reckless disregard for the truth" makes material false statements or omits material facts. *Franks*, 438 U.S. at 155; *See also, e.g.*, *Leon*, 468 U.S. at 922-23 & n.23; *Franks*, 438 U.S. at 164-65. We and our sister circuits have frequently applied this mandate. *See, e.g.*, *Colkley*, 899 F.2d at 301; *Burke*, 405 F.3d at 81-82; *Holmes v. Kucynda*, 321 F.3d 1069, 1083 (11th Cir. 2003); *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985).

Det. Dougans does not contend to the contrary. But, although his argument is not entirely clear, Det. Dougans nevertheless seems to claim entitlement to qualified immunity on the theory that the magistrate found that his affidavit provided probable cause to issue the warrant. Twenty years ago in *Malley*, however, the Supreme Court rejected such a contention. *Malley* holds that qualified immunity does *not* protect an officer who seeks a warrant on the basis of an affidavit that a reasonably well-trained officer would have known failed to demonstrate probable cause — even if the magistrate erroneously issues the warrant. *See Malley*, 475 U.S. at 345 (holding that in such circumstances a magistrate's finding of probable cause and issuance of the arrest warrant does not shield an officer from damages liability). A magistrate's issuance of the warrant will not shield an officer when the warrant affidavit is "so lacking in indicia of probable cause as to render official belief in its existence unreasonable," *id.*, nor will it shield an officer when the underlying affidavit includes deliberate and reckless misstatements and omissions, as here, *see Burke*,

405 F.3d at 82. As we explained in *Brooks*, "the judicial determination of probable cause does not 'break[ ] the causal chain between the application for the warrant and the improvident arrest' if the officer who sought the warrant did not possess probable cause." 85 F.3d at 184 n.7 (*quoting Malley*, 475 U.S. at 344 n.7).

The law was unquestionably clearly established at the time of the events at issue here. Det. Dougans had "fair warning," *Hope*, 536 U.S. at 741, that the Constitution did not permit a police officer deliberately, or with reckless disregard for the truth, to make material misrepresentations or omissions to seek a warrant that would otherwise be without probable cause. No reasonable police officer in Det. Dougans's position could believe that the Fourth Amendment permitted such conduct. As we explained a decade ago, "a reasonable officer cannot believe a warrant is supported by probable cause if the magistrate is misled by statements that the officer knows or should know are false." *Smith v. Reddy*, 101 F.3d 351, 355 (4th Cir. 1996). Indeed, our sister circuits have also followed *Franks*, *Leon*, and *Malley*, and expressly held that the right asserted by Plaintiff here is "clearly established." *See, e.g.*, *Burke*, 405 F.3d at 88 (noting that the "prohibition on material omissions" in warrant applications is "clearly established"); *Holmes*, 321 F.3d at 1084 (holding, as of 1998, that it was clearly established law that "the Constitution prohibits a police officer from knowingly making false statements in an arrest affidavit about the probable cause for an arrest." (internal quotations marks omitted)); *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1295 (9th Cir. 1999) ("We begin with the precept that a police officer who recklessly or knowingly includes false material information in, or omits material information from, a search warrant affidavit cannot be said to have acted in an objectively reasonable manner, and the shield of qualified immunity is lost." (internal quotation marks omitted)); *Moody v. St. Charles County*, 23 F.3d 1410, 1412 (8th Cir.

1994) ("It is clearly established that the Fourth Amendment requires a *truthful* factual showing sufficient to constitute probable cause before an arrest warrant can issue." (emphasis added)). Det. Dougans has not cited, and we have not found, any court that has held to the contrary.

In sum, well before the events at issue in this case, it was clearly established that a police officer could not lawfully make intentionally or recklessly false material statements or omissions in order to obtain a warrant. Accordingly, Det. Dougans is not entitled to qualified immunity, as a matter of law, on the present record.

III.

For the foregoing reasons, the judgment of the district court granting summary judgment to Det. Dougans and the County is

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 15, 2007

No. 05-2250
CA-05-292-RWT

DANIEL ANTHONY MILLER

Plaintiff – Appellant

v.

PRINCE GEORGE'S COUNTY, MARYLAND, A Body Corporate and Politic; JOHN L. DOUGANS

Defendants – Appellees

On Petition for Rehearing En Banc

The appellee's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for the En Banc Court.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt)

DANIEL ANTHONY MILLER,	:	
Plaintiff	:	
	:	
	:	
vs	:	Civil Action:
	:	RWT-05-0292
	:	
	:	
PRINCE GEORGES COUNTY, MARYLAND,	:	
Defendant.	:	

Monday, October 31, 2005

The above-entitled action came on for a Motions Hearing Proceeding before the HONORABLE ROGER W. TITUS, United States District Court Judge, in courtroom 2A, commencing at 11:36 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE PROCEEDINGS OF THE CASE AS RECORDED AND REQUESTED BY COUNSEL.

APPEARANCES:

On behalf of the Plaintiff:

TERRELL N. ROBERTS, III, Esquire

On behalf of the Defendant:

RAJESHANAND ANAND KUMAR, Esquire

Tracy Rae Dunlap, RPR, CRR (301) 344-3912
Official Court Reporter

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THE CLERK: The matter now pending before this court is civil docket RWT-0-0292; Daniel Anthony Miller versus P.G. County, Maryland, et al. We're here for the purpose of a motions hearing.

Counsel, would you please identify yourselves for the record?

MR. ROBERTS: Yes. Terrell Roberts on behalf of the plaintiff, Daniel Anthony Miller, who is present.

MR. KUMAR: Good morning. Raj Kumar on behalf of Prince George's County, Maryland and its officers.

THE COURT: Mr. Kumar, you may proceed.

MR. KUMAR: Thank you. Good morning, Your Honor. Pursuant to notice, I've tabbed the cases. I don't anticipate using all of them, but they're numbered and, as I refer to the number, it will be easier to get to the case.

THE COURT: Okay.

THE CLERK: Counsel, would you just pull that microphone closer to you - - a little closer to you, unless you're going to speak from the podium right there.

MR. KUMAR: Is it okay to speak from here?

THE COURT: Either place is fine with me.

MR. KUMAR: Good morning. Your Honor, as you're aware, I submitted our motion - - the defendant's motion for summary judgment on the basis that Officer Dugans is entitled to qualified immunity because his actions in obtaining the warrant was reasonable. With respect to the reason I'm saying that is because if we look at the alleged constitutional violation, we're going to a violation of unreasonable seizure, which is clearly established. So then the only question should be whether or not Officer Dugans believed he had probable cause, not whether he in fact had it. And as the - - as in my motion, I've outlined the case law supporting that theory.

Now, before I go on, I would like to say that Mr. Miller was not seized by Prince George's County or Officer Dugans but, in order for any of this to make sense, I guess I would go into the plaintiff's complaint and allegations that we caused his seizure. With that, Your Honor, I would address the initial part of the complaint which is alleging that Officer Dugans made two false statements and. As I indicated in my motion, the first false statement that is being alleged is really the - - the statement that Moses wrote down

the tag number that is undisputed; that that was made because it's in the statement, and he testified in his deposition that he said he wrote down the tag number.

Now, the portion that is of contention is the actual tag number. So, if you look at the case that supports that, that talks about the false statement, we go into - - just the tag number. And if we take out the tag number, Officer Dugans still has probable cause to seek a warrant. We know that because of the - - several things that he has done, which is he interviewed witnesses, he visited the crime scene, he took written statements. In addition to that, he went to where the lawn mower was recovered and he interviewed people at the scene there, also.

Most importantly we have the victim, Jessica Maddox, who indicated that to Officer Dugans the name "Daniel Miller. " And as in my motion, the case that talks about an officer just getting the name from a victim in the case that I cited, the Fourth Circuit did in fact analyze an officer who just got the name "Robert Brown," and he ran that name, and when that name was ran it generated a matching name from a Virginia CIN search.

In this case Officer Dugans did the same thing. But, more importantly, we know he did additional things, which is he verified from a local computer printout from the Prince George's County Sheriff inquiry and he got the name "Daniel Anthony Miller" that indicated it's a white male.

THE COURT: Where did he get the "Daniel Anthony Miller" name from? I know he got Daniel Miller from eyewitnesses.

MR. KUMAR: Right. When he got the Daniel Miller, he took that and he started a computer search. With the computer search, the local sheriff's department computer

search, the names came up Daniel Anthony Miller, and he got a few Daniel Anthony Millers. In his deposition and in his application, he lists the Daniel Anthony Miller he got from the sheriff.

What we know today is that the Daniel Anthony Miller he got from the computer said a "white male." Ultimately, we know that now matches Mr. Miller's identifier, such as his date of birth and his name. But at the time that he was looking for a "Daniel Miller, "not an "Anthony Miller" - - just Daniel Miller. And if we look at the *Brown* case that I cited, we had a gentleman who came up with a middle name as well, but in this case, at the time, he was looking for a white male. That's undisputed, because when you look at all of the testimony and the factors that he took to do an investigation, we know that it's a white male. That's undisputed that it was a white male who stole the lawn mower - - the suspect. So, when he got the sheriff's identification, which is an exhibit in this case, he took that information and he did some more searches.

Now, we know that there was a Daniel Anthony Miller that is a black male, which is the plaintiff, but the testimony is undisputed that he disregarded that, and we noted - - that's not just the fantasy or just the speculation. We know that to be true, because at the time it is undisputed that the alleged suspect is a white male. So, when he looked at Mr. Miller's information that we now know today was Mr. Miller's information, he said in his deposition, I disregarded that information because I knew my suspect was a white male.

Now, in addition, he specifically states in his deposition that he did everything he could. On page 133 of the deposition part of - - my attachments, he said, I disregarded the black male. I did everything. I made sure that I didn't have a black male charged with the crime that

was committed which by a white male. And then he also says that by running the CGIS, it assists me in determining completely, without a doubt, that the person I was charging -- it's not a mix-up with another ethnic group, but it's a white male by the name Daniel Miller.

Now, the reason I'm emphasizing this - -

THE COURT: Is there out there a Daniel Anthony Miller who is a white male?

MR. KUMAR: No. Not that I'm aware of. In the computer system there's a Daniel Anthony Miller that's a white male.

THE COURT: Is that the same as the plaintiff in this case?

MR. KUMAR: Correct. Because - -

THE COURT: Misidentified.

MR. KUMAR: In the computer system Mr. Miller's information apparently, at some point, was entered in the race was a white male.

THE COURT: Okay.

MR. KUMAR: That's what Mr. Dugans used from the computer inquiry.

Now, there's a lot of - - there's been a challenge from the plaintiff that while Mr. Dugans knew he was charging the plaintiff, but that can't be because we know that his whole intent was to seek a white male suspect, which is why he used the information he got from the computer system that indicated it's a white male.

Then we go on to the alleged tag number. The plaintiff alleges that somehow Mr. Dugans fabricated the tag number and he did this to link the Jeep that Mr. Miller once owned to be the crime scene Jeep. That's speculation. That is a complete conclusion without any proof. What is proved is that in the statements given to Mr. Dugans at the time he conducted his investigation, we know that the eyewitness, Mr. Moses, testified both in his written statement and Jessica Nichols that the Daniel Miller that they suspected of stealing the lawn mower was driving a Jeep. That's why a Jeep is in the application of statement and charges.

To address the allegation of the falsified tag number, we must look at what the case law says. And if we look at it, we will see that the one case that talked about the word "received" that I cited in my motion, the court has said that even if we assume the word "received" was to mean that the officer intentionally meant to mislead the magistrate that the person received a ticket. It was uncontroverted that the ticket was on the person's car and, in my case, the reason that's important is because we know it's a fact that Mr. Moses wrote in his statement, I wrote down the tag number. That's a true statement. So, we can't say that that's a false statement with the tag number, because that statement is undisputed as true.

Therefore, even if - - if we look at it, it was not essential to probable cause, because Mr. Dugans indicated immediately after that that the tag number turned out to be expired and, therefore, I did not look any further into that, because not only was it expired, but it came back to a black male with the name Daniel Miller, and that's part of his deposition testimony.

Now, the plaintiff is saying that while we use the tag number to get to him - - but again, I must - - it's redundant. It must be noted the person that was being sought was a white male.

Now, the second statement is that - - the second alleged false statement is that - - court's indulgence - - is that Mr. Dugans learned of the identity of the plaintiff. This is the actual false statement. The identity of defendant Miller was obtained interviewing the victims and witness. That's a true statement. We know from the statement of charges that Officer Dugans learned of the identity "Daniel Miller" from interviewing Jessica Nichols, who stated that the person's name is Daniel Miller, based on the eyewitnesses's version of the accounts that he witnessed the car leaving with the lawn mower.

Now, that's not a false statement at all. There is nothing in here that's false. Now, what I think that the plaintiff saying is that
we learned of his identity from the victim and the witness, and that is completely not the case because it cannot be the case, because the Daniel Anthony Miller that is sitting in this courtroom is a black male, and everything conducted in the investigation was to seek a white male. So, this statement is true, Your Honor.

We would submit that both of those allegations as the false statements are not proven to show that even if you look at them, that there was essentially probable cause. The second statement is not a false statement. So, I would submit to the court we haven't even gotten to the part whatever is essential or probable cause, because it's an accurate statement, the first one.

If we take out the tag number and we just have that Moses wrote down the tag number, that, with the case that I

cited to the court, shows that the tag number itself was not necessary to probable cause.

Now, the plaintiff took the position that Mr. Dugans said, well, the tag number was allegedly turned in, so therefore this was an intent that he believed that the tag number was somehow - - that he relied on that, but that's completely contrary to his deposition statement, which is - - which on page 123 of Officer Dugan's deposition he says, I understood the tag number to be turned in because I couldn't do any further - - the tag number was turned in, because otherwise a warrant would be turned in for the person who didn't turn in their tag number. And I would submit to the court, if you look at page 123, it's not that - - this is a term of art, "allegedly," but he said that I understood it to be turned in.

In addition to that, Your Honor, there is an allegation of an inadequate investigation conducted by Officer Dugans.

Your Honor, I've cited several cases - - not just one but several - - that supports this kind of investigative work conducted by Officer Dugans unless that the court - - the Fourth Circuit - - has found to be adequate investigation. This man interviewed witnesses, went to the crime scene, took statements and did a computer search, and he found what he believed at the time to be his suspect.

Now, again, the test is not whether he had probable cause but whether he believed he had probable cause, and there are several cases in the packet that talk about when you have a mistaken identity how that officer reasonable believed he had probable cause to seek the warrant.

In addition, Your Honor, there are a couple of things that are - - that must be addressed. There is an allegation in or against Officer Dugans that he should have somehow gotten a photograph from MVA and therefore that would have cured everything. But look at the plaintiff exhibit. The gentleman's - - the gentleman's photograph was created in '04 - - 8/6/2004.

When you look at the exhibit of Daniel Paul Miller, Jr., that creation into MVA occurred in 2004. Even if you wanted to say, well, okay. He should have done that. He couldn't have gotten it, because it wasn't created at the time.

When you look at Mr. Miller's photograph from MVA, we know that that is an accurate - - or at least we can conclude it's accurate that when they say it's created, because when you look at Mr. Miller's creation of his photograph, it is done in 1995. So, we can at least conclude that the creation of this photograph occurred in '04.

The allegation that while Mr. Dugans should have done something to put a reliable address on the warrant - - he sure did that. The address that he placed on the warrant is from speaking to several witnesses, including the location of the recovery of the lawn mower. When he spoke to Megan Miller, Megan Miller said, Daniel Miller stays here. He used that address on the warrant - - significantly on the warrant and a statement of charges. It does not include Mr. Miller's sound ex-driver's license number. It has his name, his date of birth and his - - a height and weight, but it does not include the drive's license number. The only thing that's on the - - the only way where that - - the driver's license shows up is on the application.

So, when we take the case forward to when Mr. Miller was stopped in Virginia by the Virginia State trooper, let's assume the warrant information is what they relied on.

We know, based on the exhibit, that the arrest warrant - - the statement of charges does not include his driver's license number. The only place that that shows up is in the application. So, to suggest that somehow we used everything to get to Mr. Miller is just not acceptable under Officer Dugans' investigation, because we know he was looking for a white male.

Now we go to Virginia. Mr. Miller is arrested in Virginia. There is a dispute here as well. We caused his arrest because we put all of his information on the warrant. But that - - you have to then take the position that when Officer Dugans was doing all of this, somehow he totally disregarded - - somehow he discounted everything and said, well, this black guy in Virginia, when he gets arrested, I don't care about that, even though I'm looking for a white gentleman as the suspect. That just cannot - - that has no basis in this lawsuit, because we know that the person who was sought was a white male.

THE COURT: Is the officer in this case the only one that's been sued? Was there any action brought in Virginia against the Virginia authorities?

MR. KUMAR: No, Your Honor, it's only Officer Dugans and Prince George's County, Maryland.

THE COURT: All right.

MR. KUMAR: When we're in Virginia we have this testimony from Trooper Ward that they knew of the discrepancy of the race. Then we have this testimony from Ricky Burrow, from Prince George's County, that he changed the race from white to black and that he knew that -

THE COURT: Has he been sued?

MR. KUMAR: No, Your Honor.
THE COURT: All right.

MR. KUMAR: Then when he changed the race, that was communicated to Virginia. He said that even after he spoke to someone in Prince George's County - - a supervisor of Officer Dugans' who said that the person we are looking for is a white male, and it's based on a report - - notwithstanding that, he said, the guy you want is a black male in Virginia.

Once that occurred with Magistrate Satori and he issued the Commitment Order, subsequent commitment orders were issued. Our position is that assuming you take the position that we're responsible for his seizure, the law is clear that unless a magistrate find probable cause, the subsequent pretrial detention seizure is reasonable. Not only did we have one commitment order, but we had three.

There is no evidence presented on the record as to why Mr. Miller was kept in Virginia. Mr. Miller had two attorneys in this case in Virginia and was still denied bond. It is clear from the information that was served on Mr. Miller, which is the statement of charges and accompanying documents, that a white male suspect is the person that is identified.

Now - - court's indulgence. What we have is - - what we have is the *Rucker* analysis - - the case of *Rucker*. Now, Mr. - - the plaintiff takes the position that it's not applicable, but if you look at the *Shaver* case that I cited, this district took the position that *Rucker's* applicable because when you have a seizure, it is about the intended object of the seizure. Clearly it's undisputed that Mr. Miller was not the intended object of the seizure.

Now, I understand that *Rucker* dealt with the bystander, but the case that I have - - that I cited to the court dealt specifically with *Rucker's* number 8, Your Honor. But the case that supports our position that *Rucker* is applicable is the *Myers versus Shaver* case, where Judge - -

THE COURT: What tab is that?

MR. KUMAR: *Shaver* is 15.

THE COURT: 15.

MR. KUMAR: Judge, this has nothing to do with - - this case has nothing to do with a bystander, it just takes the position that what that language means is if I intend to issue a warrant for Roger W. Titus, that's who I want to be apprehended. If there is another Roger W. Titus out there that is a black male, but I issued it for a white male, and somehow the black version of Roger W. Titus was apprehended, that was not the intended object of the seizure.

Virginia executed a seizure. They caused a seizure. My position, Judge, is we don't even get into any of the analysis, because the 1983 claims are based on a Fourth Amendment seizure that is being alleged and. If we have a seizure, where did it occur? It did not occur under Mr. Dugans or Prince George's County, it occurred in Virginia. If we took the analysis that way, this case stops. However, if we go into the allegations, they also fail for the reasons I've stated.

Now, Your Honor, I know I only have 45 minutes, and I know the court's allowed an our had 30 minutes, and I don't want to repeat everything - -

THE COURT: You don't need to use the whole time.

MR. KUMAR: I know. I don't want to repeat everything I said in my motion, Judge, because I will submit that there are things in there that I haven't covered, but those are the main point, and I will be more than willing to entertain any questions with respect to specific things in the motion.

THE COURT: Well, let me ask you this. There are state common law claims in here.

MR. KUMAR: Correct.

THE COURT: You've asserted some defenses.

MR. KUMAR: Yes.

THE COURT: With respect to the state common law claims and - - you've asserted public official immunity. How does that apply to an intentional tort?

MR. KUMAR: Your Honor, this - - how it applies - - when I reviewed Mr. Roberts' opposition, I will concede that malicious prosecution - - there is no false imprisonment claim here; there's just a malicious prosecution.

THE COURT: Malicious prosecution is an intentional tort.

MR. KUMAR: Correct.

THE COURT: How do you get - -

MR. KUMAR: What I'm saying, Your Honor, is this. The malicious prosecution cannot stand if there is probable cause.

THE COURT: I understand. All I'm focusing on is one narrow question. How do you get any solace under official immunity if it's an intentional tort?

MR. KUMAR: Because when you look at the public official immunity, Your Honor, it gives the immunity for an officer performing a discretionary function without malice. Without malice. So in this case there is no factual support that Mr. Dugans exercised any malice against Mr. Miller, a black male, when everything focused on a white male suspect.

So my position, Your Honor, is the public official immunity is applicable to Officer Dugans with respect to his discretionary act in seeking a warrant with a magistrate.

Now, in addition to that - - just looking at the tort itself, it fails, because if there's probable cause - - if at the time Officer Dugans believed he had probable cause or he acted reasonably in seeking the warrant, then the issue of malicious prosecution will fail, because one of the elements is probable cause, and you have to infer malice from a lack of probable cause.

THE COURT: The problem is that it appears that *Lovelace versus Anderson* has held that the defense of public immunity only applies to negligent acts. I mean, I understand your argument that there isn't a cause of action in the first place, but if you assume for the moment there is a cause of action asserted here for malicious prosecution and that they survive summary judgment on that, how does a public official immunity apply here, where it's not a - - it's an intentional act.

MR. KUMAR: Your Honor, I thought - - court's indulgence.

MR. KUMAR: Your Honor, because - -

THE COURT: Go ahead.

MR. KUMAR: Your Honor, because notwithstanding the fact that it's an intentional tort, the position is that the officer was performing a discretionary function. So, therefore we can't have the cause of action for the malicious prosecution when his discretionary act was seeking probable cause for a warrant that there is no intentional tort of malicious prosecution. So, the claim itself of a - -

THE COURT: That's immunity of the Prince George's County government itself.

MR. KUMAR: That's the - - Prince George's County has the immunity for the common law torts of the officer.

THE COURT: Speaking just of the officer and just of public official immunity. Isn't there a problem with public official immunity applying to an intentional tort under *Lovelace versus Anderson*?

MR. KUMAR: Your Honor, we have struggled with the opinion of *DePino*, where they are saying that *DePino* says that you don't have immunity for constitutional torts.

THE COURT: Right. I recognize that that's the case, because we've got - - what I'm dealing with here is not a constitutional tort for the questions I'm asking you but good, old common law torts.

MR. KUMAR: Judge, there is nothing that says - - that I could find that he doesn't have the public official immunity in performing the discretionary function and a discretionary act and –

THE COURT: I mean, Count Five in this case alleges constitutional torts, but the other - - as to which there is no immunity under *Colley versus Baltimore*, but I'm speaking now of Count Four, malicious prosecution. How does the officer have public official immunity if it's alleged to ban intentional tort?

I recognize you consider that there isn't a tort in the first place, but - -

MR. KUMAR: I think maybe Your Honor rightfully sees what I'm thinking about - - the malicious prosecution - - which is that the probable cause will be dispositive of the malicious prosecution. If you don't find he had probable cause, then the malicious prosecution claim will stand, because as an element of malicious prosecution you have to have probable cause.

THE COURT: Or absence of probable cause?

MR. KUMAR: I'm sorry, for absence of probable cause.

So, my analysis is that in the performance of the discretionary function of seeking the warrant and doing an investigation that he got probable cause, then he has the public official immunity for the discretionary act of developing probable cause.

THE COURT: All right.

MR. KUMAR: Thank you.

THE COURT: All right.
Mr. Roberts.

MR. ROBERTS: Thank you.

Your Honor, what I am deriving from the defendant's position here is that they're really just honing in on qualified immunity. They're essentially, I think, conceding that there is a Fourth Amendment violation here, a seizure, but it's just that Officer Dugans believed that his conduct was lawful. I think that the record shows that there are genuine disputes of material fact on this, and the real essence of the plaintiff's claim is that we have a *Franks* violation here, and the *Franks* violation is clearly one not whether or not the officer truthfully reported that a witness wrote down the tag number but whether or not, "did the witness Moses record the tag number of the vehicle as Maryland tag 938751N" - - I'm quoting from the application for the statement of charges.

Now, that is the key fact essential to probable cause here. The reason is, if you read this application in a common sense way, you'll see that the only way they link the plaintiff, Daniel Anthony Miller, to this crime is by showing that it was Daniel Anthony Miller's Jeep that was seen at the crime.

THE COURT: That's not correct. You've got people who eyeballed him by name.

MR. ROBERTS: There's only one - - okay. "Eyeballed" him in terms of saying, I saw the person at the crime.

THE COURT: I saw Daniel Miller.

MR. ROBERTS: Okay. First of all, the only person to do that - - and that's not what happened - - is Moses. Moses only sees the vehicle. He sees the person in the vehicle. He was never shown a photograph. He doesn't know Daniel Miller. Moses doesn't know who Daniel Miller is. He's the only one that sees the Jeep at the scene.

The Nicholses are not there. They don't see the burglary take place; they don't see the Jeep at the scene. They come home later, they look through the - - after they get up in the morning they see that their garage is broken into; they walk around the community and they find out that Mr. Moses saw - - saw the Jeep, so they go talk to Mr. Moses.

Now, Mr. Moses doesn't tell them that he got a tag number, because if he had he would have given it to - - as he testified, he would have given it to the Nicholses.

So, there's only one witness, and that's Mr. Moses, and Mr. Moses never says - - it's not in the application, but it's not even in any of the discovery we have. He never says, I know who Daniel Miller is. I know Daniel Miller. It was Daniel Miller. That never happens. He doesn't know who Daniel Miller is. Just the Nicholses. So, in fact, the only way they link the plaintiff to this crime is by saying, it's the Jeep, the Jeep that Moses saw. He clearly sees a Jeep. It's described as a green Jeep and everything to the Nicholses, when they talk to him. But the only way they link the Jeep to Mr. - -- to the plaintiff here is this tag number.

The tag number comes back - - is registered to a Jeep that was owned by the plaintiff back - - back when. By '99 he had turned the tags in, but that's how they link him. And as you read down the application it says, "the Jeep Cherokee is the property of the defendant, Miller. Witness advised it was the same Jeep seen by him driving out of the driveway of victim Nichols' residence." So that is the only way they can link this plaintiff to it is through the Jeep. I agree that if you look outside the application that the Nicholses clearly knew - - had determined on their own that it was Daniel Miller - - this fellow they knew as Daniel Miller who had committed the crime. That's clear. But the - - but Dugans - - the way Dugans proceeded here was to falsely report that he got this tag number.

THE COURT: How does this record support the notion that he deliberately and falsely reported that?

MR. ROBERTS: It does it by this way, Your Honor.

THE COURT: You've got a statement signed by Mr. Moses that says he wrote the tag number down.

MR. ROBERTS: No, no, no.

THE COURT: Not the tag number, but he wrote it down?

MR. ROBERTS: Wrote down a tag number, correct. And it is very - - I think a jury could really - - there are disputed facts around that, because the tag number's mysteriously not put into the statement. The officer says that he was given the piece of paper, and the piece of paper has just disappeared. Moses said, I didn't give him any tag number. I don't remember giving him any piece of paper with a tag number. And I can assure - -

THE COURT: Why did he put that in his statement, then?

MR. ROBERTS: Maybe he did see a tag number, but that doesn't mean that he gave him that tag number that's reported. The key is the tag number. I'm not disputing with you that the officer had the good faith basis to believe that Moses wrote down a tag number. I agree with that, because it's in his statement. But the key is, what tag number? And the tag number here, 938751, is falsified, and here's why it's falsified: He gets this tag number not by Moses; the facts are he gets the tag number by first running the name "Daniel Miller" through the sheriff's records.

THE COURT: How is it uncontroverted that he got it that way? The tag number.

MR. ROBERTS: It's controverted because I have introduced an affidavit by Sergeant Dwayne Lee of the Maryland State Police, who has analyzed the hard - - the records that the officer relied upon. He looked at those and said he didn't run this by tag number.

See, the - - and Dugans maintains he got the tag number, and therefore he ran the tag number and came up with a name. But that's not what he did. He actually - - it is clear from looking at the records. Sergeant Lee says, you look at the records. What he did was he ran names through the sheriff's records: Daniel Miller. It comes back with three or four different ones. He then took the license - - the driver's license number of Daniel Anthony Miller, ran that with the motor vehicle department, and he came back with Daniel Anthony Miller, an address, and a tag number - - consequently, the same tag number. He took that tag number - - that's the tag number - - he found that that person had a Jeep. That's his confirmation that the Jeep is the property of defendant Miller.

He did have a Jeep at one time and he took that information and said, Bingo. I've got my man. A jury could find that. That's how he had it, because Sergeant Lee says he did not run a tag number as Dugans had indicated he did in his deposition. He ran it by tag number.

THE COURT: So what?

MR. ROBERTS: Well, it means he - - he did not - - that leads to a - - an inference that he did not get the tag number from Mr. Moses, because Mr. Moses - - that's the way the tag number links - -

THE COURT: We have Mr. Moses's contemporaneous statement saying that he wrote the tag number down.

MR. ROBERTS: Your Honor, what I'm getting at is

THE COURT: Are you suggesting he wrote a different tag number down and that was the number given to

the officer, and the officer didn't like the number he saw, threw it in the trash and got another one for the plaintiff in this case?

MR. ROBERTS: I'm suggesting this. When he interviews Mr. Moses, it's nearly three weeks later after the crime. Mr. Moses didn't have the tag number. He didn't have the tag number, and he certainly - -

THE COURT: If he didn't have the tag number, why would he write down that he wrote the tag number down?

MR. ROBERTS: He could say, you know, when I saw this I wrote the tag number down, but that doesn't mean that three week later he has the tag number to give to the officer. And what it also - - Your Honor, you have to understand, he had the tag number. He was a friend of the Nicholses. He would have given the tag number to the Nicholses, who would have given it to the police, and this would have been a simple matter. They would have gotten - the tag number is the tag number to Daniel Paul Miller, Jr.'s Jeep, the records that I've introduced.

THE COURT: How can I infer that - -

MR. ROBERTS: Because the motor vehicle records, which were available to the officer, show that there's a

Daniel Paul Miller, Jr. who's the approximate age of the suspect they're looking for, 21 or 20, something like that, who owns a Jeep, and he has a different tag number. That's the Daniel Paul Miller that is the suspect.

In Exhibit 2, which is the Nicholses affidavit - - Jessica Nichols' affidavit, she identifies that person. All he had to do, Your Honor, was to ask the Nicholses who this person is, and he's got the suspect to verify that this is the right suspect. After all, Your Honor, this person is 35 years of age - - the plaintiff is 35 years of age. The suspect was around 20.

Let me go back, Your Honor. Mr. Kumar says in his argument there is a contradiction. Dugans had both the P.G. County Sheriff's computer search and the motor vehicle records search. The P.G. County Sheriff has Daniel Anthony Miller as a white male, same date of birth, everything else, that same individual. If you look at the motor vehicle records, they show him to be a black male. Dugans had that information. He knew or he was aware of the discrepancy.

Now, if it's probable that there are - - there is a Daniel Anthony Miller out there, same date of birth, same height, weight, but one of them is a black person and one of them is a white person, that's fine; that's not probable and there's no evidence of that. So, he knew that there was a discrepancy there. When he says, I went no farther, a jury could disbelieve that when he comes to the motor vehicle records and says, I went no farther. That's an after-the fact now version of events.

In fact, he did go father. He took the tag number, which he didn't have, from Moses. He took the tag number from the motor vehicle records. That's how he got the tag number. He ran the license - - the driver's license number of the plaintiff and found that he owned a Jeep and took that tag

number and falsely put it in the application. These are disputes of fact. These are reasonable inferences that can be drawn from the evidence. And if they're reasonable, the court, I think, must not grant summary judgment. These are clearly inferences from the evidence that this was a falsified - - I know it's not something that's easy.

THE COURT: If it's falsified, why would he list in the application that the defendant who's arrest he was seeking was a white male?

MR. ROBERTS: Well, because I think that - -

THE COURT: You're saying he looks these things up and realized there's a discrepancy.Doesn't he resolve the discrepancy by putting down in his application that it's a white male?

MR. ROBERTS: No. I think if you were going to really be truthful to the magistrate you would say, I have two sets of records. One says he's a black male, one says he's a white male, and let the judge who's issuing the warrant determine it. He knew the suspects were described as a white male; he had to put it down as a white male, he just did not - - but he had information that it was - - that it was a black male.

THE COURT: Isn't it reasonable to assume when you apply for a statement of charges and you put in there that the person's a white male and a warrant is issued, that you have some comfort level that people are not going to go off the deep end and arrest a black male, when your description of the suspect says "white male?"

MR. ROBERTS: No - - and the reason is this - - because we've attached the deposition testimony of the officer who arrested him, Trooper Ward; we've attached the

deposition of Ricky Burroughs, who is the civilian employee of the Prince George's County Sheriff's Department. They said all the identifiers - - that's why they didn't release the plaintiff down there - - all the identifiers matched. Date of birth - - all except one. Date of birth, height, weight, and the application which was faxed from P.G. County.

The application for the charges was faxed down from Prince George's County to the state police down in Virginia. That had his Maryland driver's license number. The trooper said he ran - - now, at that time plaintiff had a Virginia driver's license. He ran the Virginia driver's license record, and it indicated that Mr. Miller had turned in his Maryland driver's license to Virginia and it had that same driver's license number. So, he had that matching information.

The testimony of these fellows says that, you know, sometimes race is just not correctly noted on law enforcement records. That kind of a mistake can happen, but that's - - you're not going to release an individual that otherwise matches all those identifiers. It's just irresponsible for them to do that. They had the right person.

Now, the question here is, is - - their argument is, well, we didn't - - we didn't cause that mistake; that was caused by the trooper who shouldn't have arrested him. That's a question of fact for the jury to determine.

THE COURT: Is there any action pending against the Virginia trooper?

MR. ROBERTS: No, no.

THE COURT: Any action pending against the sheriff who changed the record - - the race records?

MR. ROBERTS: No, because they did their job. They arrested the person who was named in that warrant. They did their job. You can't - - they're not liable for this. The person who's liable for this is the person who caused the wrong person to be arrested. He put this information - - Dugans, that is, put that information out there, causing this man to be arrested. They acted reasonable. He didn't.

Again, Your Honor, I have to say that the fact here is that he deliberately - - at least it may be inferred from the evidence that we've introduced that he falsely included this tag number jut to link the plaintiff to this crime.

Moses has stated, I did not provide him that tag number. I did not provide him that tag number. Your Honor, look. Quite clearly that tag was turned in in 1999. I mean, one of - - what are the possibilities that after he turns it in, the plaintiff went and got the same tag number and put it back on his Jeep, or that somebody else did?

Now, I know that fraud can happen in the motor vehicle department, but that's what would have to have happened here, that somebody fraudulently got the tag out after 1999 and put it on a Jeep. That's what could have happened. But you notice how the officer says in his application that they had allegedly been turned in.

In other words, he's leaving open the possibility that, well, they really - - these tags really weren't turned in, and so he's talking about this person, the plaintiff, whose tag number it is is the person whose Jeep - - whose property it was was seen at the Nichols household. So, these create, I believe genuine disputes of fact, Your Honor.

I would also say, with regard to the photo - - the 2004 photo - - and I think it's Daniel Paul miller he's speaking about - - I didn't realize it was 2004, but the fact remains that Daniel Paul Miller, Jr., the real suspect, had a valid Maryland

driver's license at that time, and the records are in the - - in our exhibits of that fact.

So, you know, I just requested the photograph, and motor vehicles sent me a photograph and I didn't see it was 2004, but the fact of the matter is he had a valid Maryland driver's license at that time. It clearly would have had a photograph that was available to be viewed. I mean, the simple fact here is if you're a police officer and you're doing your investigation and you've been told that the suspect is skinny, about 20 years of age, white male, and you then come up with somebody like a plaintiff here who's 35 years of age and you have two sets of records, one indicating he's white one and indicating he's black, the prudent thing to do, as our expert has said, is merely to take a photograph.

If you think it's still Daniel Anthony Miller, age 35, whom you claim is a white male - - although you have records saying he's a black male. If you still think it's that individual, take the photograph to the people who know him who would have been the Nicholses who would say, yeah, that's the person or no that's not the person. You don't go ahead and just charge somebody recklessly as this individual was.

Thank you.

MR. KUMAR: Just briefly, Your Honor.

With respect to - - with respect to - - I have submitted case number 19, 2hich is the *Watkins and Arnold* case. It's a Fourth Circuit opinion, and on page 3 of the opinion the court talked about different facts doesn't mean factual dispute but, rather, a question of law. And as this court is aware, there is no evidence on the record that this officer falsified this tag number just out of the blue to arrest Mr. Miller one day when he's driving down the roads of Virginia.

On page 15 of my motion, when Moses was asked if he had the piece of paper with him, he indicated, yes, we were in front of my house. This would - - this is Mr. Moses. This would mean that somehow - -

THE COURT: Show me where this is.

MR. KUMAR: I'm sorry. Page 15 of my motion, which is page 35 of my exhibit of Mr. Moses.

THE COURT: What exhibit number is that?

MR. KUMAR: Transcript. It is - - court's indulgence. It's exhibit 18 on page 35 of Mr. Moses' - -

THE COURT: Let me get there.
Page 35?

MR. KUMAR: Page 35 would be a page of the exhibit, exhibit 18.

THE COURT: Let me get there.

Okay. What line number?

MR. KUMAR: It is line - - it would be the second to the last page. It would be line - - here it is. It's page 34.
That's a mistake on my part, Your Honor.

THE COURT: Where?

MR. KUMAR: The top of the page at line 4.
"Would you have had the paper with you?"
Of course it follows the stuff about the tag number.
"Yes. We were in front of my house."

So, this is not something that is somehow created out of thin air that we fabricated that this tag number was written down on a piece of paper. The witness who said he wrote it down testified that he had the piece of paper with him in front of his house. I mean, is this something that we created? No, it is Mr. Moses' testimony.

I think it's important for the court to see the language in the *Watkins and Arnold* case that the different facts doesn't mean a factual dispute but a question of law. I would just submit, Your Honor, on the last part of the dispute by the plaintiff is that because he said, "allegedly."

If you look at Officer Dugans's deposition, on page 123, he said, I understood the tag number to be turned in and, because of that, I didn't go any further. So, it's not supported by any evidence other than speculation that somehow not - - he saw this stuff and he just created things to go in the quantum leap to get to where the plaintiffs want this court to get to.

Your Honor, I would submit that the court should grant us Officer Dugans' qualified immunity for all the reasons I've stated, including on the state law torts. There's clearly jurisdiction and also that the officer had probable cause for his actions and he acted reasonably.

THE COURT: On July 23, 2003, the home of Jeffrey and Jessica Nichols was broken into and their Griffin lawn mower was stolen. The theft of that lawn mower has led us down a long path to arriving in this court today.

The theft of the lawn mower was reported to the Prince George's County Police Department and Officer John Dugans was assigned to investigate the theft of the lawn mower. He conducted an investigation and learned from

discussions with neighbors of the Nicholses, which includes Michael Moses, that a young white male named Daniel Miller had been seen driving a Jeep and was believed to have stolen the lawn mower.

Ultimately, he applied for a warrant and, in that warrant, named as the defendant to be charged with the theft of the lawn mower is Daniel Anthony Miller, who was described in the application as a white male, five feet nine in height, 190 pounds, born August 29, 1967, and he's charged with second degree burglary.

Approximately a year after this warrant was issued, the plaintiff, Daniel Anthony Miller, a resident of Virginia, who is a black male, was stopped by a Virginia trooper for a traffic violation. The trooper arrested him after checking with criminal information systems, even though the warrant identified the defendant as being a white male.

Ultimately, this resulted in the incarceration of the plaintiff until the mix-up was resolved and the plaintiff released. This led to him being incarcerated for the period of May 29, 2004 to June 17, 2004, a period of 19 days.

On January 20, 2005, the plaintiff filed suit against Prince George's county and Officer Dugans in the Circuit Court for Prince George's County seeking $5 million in compensatory damages, and punitive damages of $1 million.

The complaint included five counts, two under Section 1983 of Title 42 of the United States Code for unlawful arrest and what is described as malicious prosecution, but what is essentially a 1983 violation based upon charges instituted without probable cause and after having not conducted a minimally adequate investigation.

Count Three is for false arrest, a common law tort.

Count Four is for malicious prosecution, a common law tort, and Count five alleges violations of Articles 24 and 26 of the Maryland Constitution, which I assume is the Maryland Declaration of Rigs of the Maryland Constitution and, again, is on the basis that the person of the plaintiff was seized unreasonably, without probable cause, resulting from the formal institution of false criminal charges of burglary and theft.

The plaintiff also seeks attorney fees under Section 1988 of Title 42 of the United States Code. The defendants have moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Under that rule, the judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine dispute - - no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

A material fact is one that might affect the outcome of the suit under governing law, and it is clear that in order for the nonmoving party to raise a genuine issue of material fact that party may not rest upon mere allegations or denials of his pleading but must set forth specific facts showing that there's a genuine issue for trial.

I must resolve all inferences in favor of the nonmoving party.

As I indicated before, there are five counts in this complaint. Counts One and Two are for causes of action under Section 1983 of Title 2 of the United States Code.

As to these counts, the defendants, specifically Officer Dugans, moves for summary judgment in his favor on the basis of qualified immunity.

Counts One and Two are asserted only as to Officer Dugans as is appropriate in a 1983 action.

The question in a qualified immunity context is whether a reasonable person in Officer Dugans' position would have thought that his actions in applying for the arrest warrant violated the Fourth Amendment.

The reasonableness of his conduct does not turn on whether probable cause was in fact present but whether the officer could have reasonably thought there was probable cause to seek the warrant.

Qualified immunity is lost only if the warrant application is so lacking in indicia of probable cause to render an official belief in its existence unreasonable.

An officer is not denied qualified immunity for making a mistake. So, the question can be reduced to, first, whether the party has made a substantial, preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in a warrant affidavit; and, two, that the false information was essential to the probable cause determination.

It is clear with the 20/20 vision of hindsight that a mistake - - perhaps a series of mistakes were made, first in connection with the application for the warrant and then by the Virginia authorities, as well as the sheriff who disregarded what was in the warrant application identifying the defendant whose arrest was sought as being a white male.

Under the circumstances of this case, giving all of the inferences from the undisputed facts in favor of the plaintiff, I cannot conclude that a jury could reasonably conclude that this officer knowingly and intentionally, or with reckless

disregard for the truth, included information in his application for the warrant.

Secondly, I cannot conclude that the false information was essential to the probable cause determination. That determination was based upon the defendant Dugans' correct reporting to the magistrate that the white male identified as Daniel Miller was the person who had stolen the lawn mower.

Accordingly, I conclude that Officer Dugans is entitled to qualified immunity with regard to counts - - with regard to the 1983 actions in this case. Even if he were not entitled to qualified immunity, it is clear that the arrest of - - the unfortunate arrest of the plaintiff in this case was pursuant to an arrest warrant issued based upon probable cause.

As noted in a number of cases - - among them the *Brown* decision - - mistaken identitifiers inevitably occur from time to time, but the law sensibly recognizes not every mix-up in the issuance of an arrest warrant, even though it leads to the arrest of the wrong person, automatically constitutes a constitutional violation for which a remedy may be sought under Section 1983.

The plaintiff has questioned the adequacy and thoroughness of the officer's investigation and has indicated in a number of respects how if the investigation had been conducted in a better manner or more thorough manner there would not have been identification of Daniel Anthony Miller as the appropriate defendant but a different Daniel Miller with a different middle name.

The Fourth Circuit has addressed that question and has indicated while it is - - it will always be possible to take

additional investigatory steps, but the law sensibly does not determine reasonableness based on second guessing.

And while it is true that Officer Dugans might have avoided the mistake by conducting additional investigation, the law does not require him to do so, whereas here it was reasonable for him to conclude based on the information he had that he had the correct Daniel Miller identified in the warrant.

Counts One and Two for that are both identified as Section 1983 claims, one identified as unlawful arrest, and the second is identified as the malicious prosecution additionally be dismissed because it was not Officer Dugans but, rather, Trooper Ward who actually carried out the arrest

of the defendant who was not the person described in the warrant issued in Prince George's County.

It is also clear, based upon cases such as *Angely versus Heinrich* that - - as quoted by Fourth Circuit in the *Broward versus County of* - - quoted by the Fourth Circuit in *Rucker versus Hartford County* that one is seized within the meaning of the Fourth Amendment only when one is the intended object of a physical restraint by an agent of the state and that unintended consequences of governmental action cannot form the basis of a Fourth Amendment violation.

By the same token, the post-arrest detention of the plaintiff, which would be comical if it weren't so significant as depriving somebody of freedom for the period of time involved here and is a tragic series of blunders, the principal factors in causing his post-arrest detention were not Officer Dugans but, rather, the Virginia State Trooper and the sheriff who confirmed incorrect information which led to his unfortunate detention.

The complaint also includes common law claims for false arrest, malicious prosecution, as well as constitutional claims under the Maryland Constitution, which are measured under different standards than the previous counts.

First of all, with regard to the false arrest claim against Officer Dugans. It is clear that the officer who carried out the arrest was not Officer Dugans and, for that reason alone, the false arrest claim against Officer Dugans must fail.

With respect to the malicious prosecution claim. A malicious prosecution claim requires four elements. Viewing the summary judgment record in the manner most favorable to the nonmoving party, the plaintiff, I am unable to find that all four elements could reasonably be concluded as being present in this case by a jury.

Those elements are, first, the criminal proceeding instituted or continued by the defendant against the plaintiff;

Secondly, the termination of the proceeding against the accused;

Three, absence of probable cause for the proceeding; and

Four, malice or primary purpose in instituting the proceeding other than that of bringing an offender to justice.

First, it is clear that Dugans did not institute a criminal proceeding against this plaintiff. The application for the arrest warrant identified the defendant as a white male, and he clearly did not bring a proceeding against a black male.

Secondly, the record, even viewed in the light most favorable to the plaintiff, does not reflect malice which, under the circumstances of this case, would require proof that the officer intentionally performed an act without legal justification or excuse but with an evil or rancorous motive influenced by hate, the purpose stains of deliberately and willfully injure the plaintiff.

This record simply cannot be read under any circumstances - - even the most favorable - - to the plaintiff to show that.

The defendant Dugans also asserts, in response to the common law counts, that he is entitled to immunity under the statutory provision, and under Maryland law that grants immunity to police officers for liability and for discretionary acts that are performed without malice.

I don't need to reach that issue because I have concluded that these counts are otherwise deficient and must - - summary judgment must be granted in favor of the defendants, but it is clear that if there were a cause of action supported by the evidence before me that this immunity would not apply, because it only applies to negligent acts, not to intentional torts as are alleged in Counts Three and Four.

I simply do not find that a jury, on this record, with all the inferences in favor of the plaintiff, could reasonably conclude the existence of either false arrest or malicious prosecution.

By the same token, the defense that's asserted by Prince George's County of immunity - - because the activities involved were governmental, rather than proprietary - - would not apply to the Maryland constitutional violations, because the court of appeals has clearly indicated

that that type of immunity does not apply to a claim of rights protected by the state constitution.

Here, however, the state constitutional claims are based upon identical provisions of the United States constitution which are incorporated into the cause of action asserted in Counts One and Two, which are premised upon 42 U.S.C., Section 1983, and the same essential analysis that applies to Counts One and Two applies with equal force to Count Five.

I find that the cause of action asserted by the plaintiff is simply not supported by this summary judgment record, even viewed in the light most favorable to the plaintiff. That is not to say that this is not a tragic situation in which a number of people bungled things and caused an unfortunate situation to occur with respect to the plaintiff, but I conclude that as tragic as it may be, it does not make the cause of action under the circumstances of this case, and therefore I will grant the defendant's motion for summary judgment and enter judgment in favor of both defendants. Thank you.

(Off the record at 12:55 p.m.)

CERTIFICATE

I, Tracy Rae Dunlap, RPR, CRR, an Official Court Reporter for the United States District Court of Maryland, do hereby certify that I reported, by machine shorthand, in my official

capacity, the proceedings had and testimony adduced upon the Motions Hearing Proceedings in the case of DANIEL ANTHONY MILLER versus PRINCE GEORGE'S

COUNTY, MARYLAND, Civil Action Number RWT-05-0292 on October 31, 2005

I further certify that the foregoing 49 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, of said proceedings.

In witness whereof, I have hereto subscribed my name, this 25th day of January 2006.

/s/ Tracy Rae Dunlap
TRACY RAE DUNLAP, RPR, CRR
OFFICIAL COURT REPORTER

APPENDIX D

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

DANIEL ANTHONY MILLER 8420 Outback Road Spotsylvania, Virginia 22553-5667	:	
Plaintiff	:	
	:	Civil No. CAL05-00066
vs.	:	
PRINCE GEORGE'S COUNTY, MARYLAND A Body Corporate and Politic 14741 Governor Oden Bowie Drive Upper Marlboro, Maryland	:	
JOHN L. DOUGANS Address Unknown	:	
Defendants	:	

COMPLAINT
(Allegations Common To All Counts)

Daniel Anthony Miller, plaintiff, by counsel, alleges:

1. This is an action for money damages brought pursuant to 42 U.S.C., Sections 1983 and 1988, the Fourth and Fourteenth Amendments to the United States Constitution and the Maryland Constitution and laws. The action is against John L. Dougans, other unknown officers

yet to be named, and Prince George's County, Maryland (hereafter referred to as "the County.")

2. This complaint alleges that the plaintiff's constitutional and civil rights were violated when he was wrongly charged, arrested and jailed for three weeks for burglary and theft. The complaint alleges that police officer John L. Dougans, who had issued the arrest warrant for the plaintiff, failed to conduct a minimally adequate investigation before charging the plaintiff. Such an investigation would have determined that the plaintiff was not the suspect whom the witnesses had identified as the man who had committed the crime. This was in clear violation of rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article 26 of the Maryland Declaration of Rights.

Parties

3. Plaintiff Daniel Anthony Miller is a resident of Spotsylvania, Virginia, and of full age.

4. John L. Dougans was at all times relevant to this Complaint a duly appointed and acting police officer of the County, acting under color of law.

5. The County is a body corporate and politic under Maryland law and was the employer of Officer John L. Dougans.

Facts

6. On July 23, 2003, the home of Jeffery and Jessica Nickols was broken into and their Griffin lawnmower was stolen. Members of the Prince George's County police department were called to investigate. Police investigators interviewed the Nickols as well as a Michael Moses who was

an eyewitness. Mr. Moses told the police that he had seen a white male, 18-25 years of age, drive a green Jeep Cherokee from the Nickols' house and that the Jeep pulled a trailer which had Nickols' lawnmower on it. As a result of speaking to Moses and others, the Nickols suspected Daniel Paul Miller, Jr., a 20 year old white male whom they personally knew. The Nickols told a Prince George's County police officer that Daniel Paul Miller, Jr. resided at 9004 Woodyard Road in Clinton, Maryland with another individual by the name of Owens. The Nickols went to 9004 Woodyard Road address to find their lawnmower. After the police got involved, the police found the lawnmower at that address.

7. Officer John L. Dougans became responsible for the investigation of the burglary and theft of Nickol's lawnmower. Due to a shoddy and inadequate investigation, Dougans (and possibly other police officer yet to be identified) wrongly identified and charges the plaintiff, Daniel Anthony Miller, with the burglary and theft of Nickols' lawnmower. A well trained police officer would have known that the plaintiff could not have been the person who committed the crime and that Daniel Paul Miller, Jr. was the person who did. The officer had available to him the information that the lawnmower was found at a place where Daniel Paul Miller, Jr. resided. Further, he knew that the eye witness, Michael Moses, had seen a white male subject in his early 20s – a description which matched Daniel Paul Miller, Jr., but did not match the plaintiff, who was an African-American male and who was some 16 years older than the suspect. Dougans had done nothing to corroborate that the plaintiff was indeed the wanted suspect. He did not ask the Nichols or Michael Moses to identify the plaintiff. Although he knew that the suspect dated Owens' sister, he did not ask her or Owens to identify the plaintiff. He did not speak with the plaintiff to ensure that he had charged the right man. He

knew that the plaintiff lived in Spotsylvania, Virginia, which made it also unlikely that the plaintiff was actual suspect.

8. Defendant John L. Dougans made materially false statements in the application for the warrant to arrest the plaintiff. Dougans stated that Michael Moses had informed him that the tag number of the Jeep in question was 938751M. But Moses had not seen the tag and told the police so.[1] Dougans also stated that he learned the identity of the plaintiff by interviewing the Nickols and other witnesses. In fact, he had not done so, for Nickols and Michael Moses clearly did not identify the plaintiff as the suspect.

9. On January 22, 2003 - - six months after any reasonably competent police investigation would have shown that Daniel Paul Miller, Jr. was the person who committed the burglary and theft of the Nickols' lawnmower - - Officer John L. Dougans applied for and obtained an arrest warrant charging the plaintiff with the crimes. On May 29, 2004, the plaintiff was stopped on a traffic stop in the State of Virginia. The officer who made the stop arrested the plaintiff on the basis of the outstanding arrest warrant. The plaintiff was taken into custody and held in the Rappahanock County jail. There he stayed until he was released on June 17, 2004. On July 1, 2004, a prosecutor in Prince George's County nol prossed the charges against the plaintiff.

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[1] The plaintiff was issued Md. Tag 938751M for a Jeep but he had turned the tags into the Maryland Motor Vehicle Administration in 1999. Therefore, it was not likely that Moses saw a vehicle with that tag number on the date of the crime. If Dougans had properly investigated, he would have determined that the suspect, Daniel Paul Miller, Jr., in fact owned a Jeep which had a different tag number.

10. On November 17, 2004, plaintiff's lawyer delivered written notice of the plaintiff's claim, in compliance with Maryland's Local Government Tort Claims Act.

11. As a direct and proximate result of acts of the Officer John L. Dougans and other unknown officers, plaintiff suffered the following injuries and damages:

a. Violation of his constitutional rights under the Fourth Amendment to the United States Constitution to be free from an unreasonable seizure of his person.
b. Mental anguish, emotional pain and suffering, humiliation, anxiety, worry, injury to health, loss of time, and damage to reputation.
c. Expense of hiring lawyers to defend against false criminal charges.
d. Economic loss in the form of lost wages, travel expenses, etc.

12. The actions of Officer John L. Dougans violated the following clearly established and well-settled federal constitutional rights of the plaintiff Daniel Anthony Miller:

a. Freedom from unreasonable seizure of his person;
b. Freedom from arrest without probable cause; and
c. Freedom from prosecution of criminal charges that lack probable cause to support them.

Count 1 – 42 U.S.C. Section 1983 – Unlawful Arrest

13. Plaintiff suffered injury and damage by reason of his arrest and detention, which amounted to an unreasonable seizure of his person in violation of the Fourth Amendment to the United States Constitution. The arrest was unlawful

and unreasonable because probable cause did not exist to believe that the plaintiff had committed the burglary and theft at the Nickols' home. Further, in applying for an arrest warrant, john l. Dougans alleged facts which he knew or should have known were false and misleading. If Dougans had truthfully put the facts in the application, a warrant would not have been issued for plaintiff's arrest.

Count 2 – 42 U.S.C. Section 1983 – Malicious Prosecution

14. The defendant John L. Dougans brought false criminal charges of burglary and theft against the Plaintiff. The charges were not based on probable cause and the officer had not conducted a minimally adequate investigation that showed that the plaintiff had committed the crimes. The charges were terminated in the plaintiff's favor.

Count 3 – False Arrest

15. The defendant John L. Dougans caused the plaintiff to be arrested and held in custody, without probable cause, depriving him of his freedom, and causing injury and harm.

Count 4 – Malicious Prosecution

16. The defendant John L. Dougans brought false criminal charges of burglary and theft against the Plaintiff. The charges were not based on probable cause and the officer had not conducted a minimally adequate investigation to link the plaintiff to the crime. The charges were terminated in the plaintiff's favor.

Count 5 – Maryland Constitutional Violation

17. Defendant John L. Dougans committed violations of the Maryland Constitution, namely Articles 24 and 26, by

subjecting the plaintiff to an unreasonable seizure of the person of the plaintiff Daniel Anthony Miller, without probable cause, and by formally instituting false criminal charges of burglary and theft.

Ad Damnun Clauses

Under Counts 1-5, plaintiff demands judgment against defendant John L. Dougans and in the amount of $5,000,000 in compensatory damages and, under counts 1-4, punitive damages in the amount of $1,000,000. Under Count 3-5, the plaintiff demands judgment against the County in the amount of $5,000,000.

Plaintiff also seeks his attorney's fees and costs under 42 U.S.C. Sec. 1988.

/s/ Terry N. Roberts, III
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APPENDIX E

EXTRACT PORTION OF ARGUMENT IN PETITIONER'S BRIEF SUBMITED TO THE FOURTH CIRCUIT

ARGUMENT

I. Qualified Immunity

The District Court properly granted summary judgment to Defendant Dougans based on qualified immunity. Miller *incorrectly* maintains that the determination of whether Dougans had probable cause or made a false statement should be for the jury. (Appellant's Brief. p. 22) However, in *Mazuz v. State of Maryland*, 2006 U.S. App. LEXIS 7660, this Court stated in assessing the defense of qualified immunity, "the threshold question that a court must first answer is whether the *facts*, when viewed in the light most favorable to the plaintiff, show that the official's conduct violated a constitutional right" *15-17, *cf. Saucier v. Katz*, 533 U.S. 194, 200-201 (2001). Also, this Court previously held "this determination is ultimately a question of law for this Court." *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1990) *See* also, *Brown v. Gilmore*, 278 F.3d 362, 366 (4th Cir. 2002)(whether facts taken in light most favorable to Plaintiff to allege a constitutional violation at all presents a question of law) and *Willingham v. Crooke*, 412 F. 3d 553, 560 (4th Cir. 2005)(the legal question of defendant's entitlement to qualified immunity under a particular set of facts should be decided by the court, not by the jury).

Additionally, "Whether a Fourth Amendment violation has occurred turns on an objective assessment of the

officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken. *Mazuz, supra,* at *14, *cf.* *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985). This is a fact-specific inquiry. Id. *cf.* *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). In order to satisfy the reasonableness requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government...is not that they always be correct, but that they always be reasonable. *Mazuz,* Id., *cf.* *Illinois v. Rodriguez,* 497 U.S. 177, 185-86 (1990).

The district court below conducted the above-required fact specific inquiry into Dougans actions and alleged false statements . JA. 684-686. In *Smith v. Reddy*, 882 F. Supp. 497, 499, (D. Md. 1995), aff'd., *Smith v. Reddy*, 101 F.3d 351 (4th Cir. 1996), the district court stated the qualified immunity inquiry therefore becomes whether "(1) [Miller] makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by [Dougans] in a warrant affidavit, and (2) [Miller] shows that the false information was essential to the probable cause determination." *cf.* *Simmons v. Poe*, 47 F.3d 1379 (4th Cir. 1995). Also, "it is well-established that a false or misleading statement in a warrant affidavit does not constitute a Fourth Amendment violation unless the statement is "necessary to the finding of probable cause." *Wilkes v. Young*, 28 F.3d 1362, 1365 (4th Cir. 1994), *cf.* *Franks v. Delware*, 438, U.S. 154, 156, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

Miller alleged that Dougans made two material false statements in his application for the warrant to arrest him. JA. 10-11. The first *mis*-stated alleged false statement is as

follows: "Dougans stated that Michael Moses had informed him that the tag number of the Jeep in question was 938751M." JA. 10. To begin, the *actual* statement in Dougans Application was "The witness Moses recorded the tag of the vehicle as Maryland 938751M." JA. 34.

The *actual* statement was not a material false statement. On August 13, 2002, eyewitness Michael Moses in his written statement to Dougans stated..."I wrote down the tag #"..." JA. 37. Although, Moses did not write down the actual tag number *in* his written statement, he has authenticated and confirmed that he did write the statement on August 13, 2002, that "I thought something was going on so I wrote down the tag number." JA. 281-283.

Moses testified that he saw a green Cherokee about three or four times on the evening of the theft. JA. 265. The driver was definitely a white male no older than 25 years old. JA. 266. The jeep was a green Cherokee and it had a wooden trailer on it. JA. 267. I didn't remember the tag number. If I did write it down, I would have wrote it down and gave it to Jeff and Jessica. But I have no recollection of giving them any tag number, none whatsoever. JA. 271.

Moses also testified that he met with a police officer in front of his house, 8907 Ballard Lane, sat in the police car and gave a written statement that he really don't recognize because it has been such a long time and my memory is not all that great. JA. 272-276. Before counsel for the plaintiff could direct Moses to the location on his statement, Moses responded, "I wrote down the tag number. Is that what you want to refer to?" JA. 276. I never wrote down the tag number. JA. 276. If I wrote down the tag number, the officer would have required me to put that tag number in this document. JA. 277. There was never a tag number that I can remember that I wrote down. I don't recall giving him a tag number. JA. 277. I really do not remember at all giving

anybody a tag number or anything. I know I didn't give a tag number. If I did, Jeff and Jessica would have had the tag number to give to you all. JA. 278. When asked if he gave Dougans a piece of paper with a tag number written down on it, Moses stated "No, not that I can remember." JA. 278-279.

Finally, Moses indicated a woman from Mr. Roberts' office contacted him and read his statement or couple of parts of it to him over the phone. JA. 288-89. Moses testified "I don't remember giving a tag number to anyone. If I ever had a tag number Jeff and Jessica would have had it. If I would have wrote down the tag number on the date of the incident, it would have been in the report. JA. 289. When asked if he would have had the paper with him, Moses indicated "Yes. We were in front of my house. If I didn't have it, Jeff and Jessica would have had it. JA. 290.

Dougans at his deposition said the piece of paper that Moses wrote down the tag number on was given to him by Moses. Dougans did not have Moses write the number in his statement since he had the piece of paper. Dougans placed the piece of paper into his folder and has since been unable to locate it. JA. 129-1362. Dougans in his Application stated "The investigation into the mentioned tag revealed they had allegedly been turned into MVA and expired 3/99." Immediately thereafter, Dougans stated "the identity of the Defendant MILLER was obtained interviewing the victims and witness." JA. 34. Also, Dougans utilized an Identification Inquiry search for a White Male suspect with the name Daniel Miller, not the tag number or any information for the Plaintiff Miller, a Black Male. JA. 50. More importantly, the name Daniel Miller was given to Dougans by the victim Jessica based on Moses' description that a white male was seen leaving the residence of the victim in a green jeep Cherokee. Also, Jessica through her own neighborhood inquiry learned from a friend of Daniel Miller,

that he was on a stealing spree and Daniel Miller did steal her lawnmower. JA. 37-46.

In *Wilkes v. Young*, 28 F.3d 1362, 1365 (4th Cir. 1994), this Court addressed an allegation of a false statement where an officer used the word "received" in an affidavit presented to a magistrate to obtain probable cause. This Court held "Even if it is assumed that Young, by using the word "received," intended deliberately to mislead the magistrate into believing that Wilkes received the summons in person, rather than on the car, his statement plainly conveys, even without the possible inference that she personally received the summons, the uncontroverted fact that the ticket had been placed on Wilkes' car." *cf. Franks*, 438 U.S. at 156 (false material must be "set to one side").

In the instant case, even if it assumed that Dougans by using the tag # "938751M," after Moses' written statement, "I wrote down the tag #," was intended deliberately to mislead Commissioner Thurston into believing that eyewitness Moses wrote down the *actual tag* number, his written statement plainly conveyed the uncontroverted fact that Moses stated that "I wrote down the tag #," of the green jeep with an attached trailer and the lawnmower on it.

Also, it is un-disputed that Dougans statement "The witness Moses recorded the tag of the vehicle as Maryland 938751M," was not essential to the probable cause determination. Dougans stated in his Application for Statement of Charges that "the identity of the Defendant MILLER was obtained interviewing the victims and witness." JA. 34. Also, it is abundantly clear that the identity of Defendant MILLER as referred to in Dougans Statement of Charges was a White Male and the tag number information was for a Black Male. Additionally, Dougans said his investigation into the tag number revealed the owner was a black male and since he was looking for a white male,

he excluded and did not go any further with the information. As a result, the alleged false information did not provide probable cause, but rather it negated probable cause or eliminated Miller, a Black Male from the probable cause determination. JA. 93-115, 126.

This Court in ***Wilkes***, *supra*, held "probable cause for Wilkes' arrest plainly existed in the absence of Young's purported misrepresentation; thus even accepting Young's statement as a lie, it could not possibly have constituted a Fourth Amendment violation because the material falsely represented was altogether unnecessary to the magistrate's finding of probable cause." Id. at 1365.

Similarly, since Dougans investigation into the tag revealed they were turned into MVA and expired, accepting the above-statement as a lie, it could not possible have constituted a Fourth Amendment violation because the material falsely represented was altogether unnecessary to Commissioner Thurston's finding of probable cause, especially since the tag information was associated with a Black Male and not a White Male as was sought in the arrest warrant. JA. 665-76.

The second mis-stated alleged material false statement is as follows: "Dougans also stated that he learned the identify of the plaintiff by interviewing the Nickols and other witnesses." JA. 10-11. To begin, the *actual* statement Dougans made was "The identity of the Defendant MILLER was obtained interviewing the victims and witness." JA. 34. Miller's alleged false statement above is in itself misleading and a disregard for the truth. Dougans never "learned the identity of the *plaintiff* [a black male] from the Nichols and other witnesses." JA. 11.

On July 25, 2002, Jessica Nichols in her written statement to Dougans indicated that Daniel Miller was the person that stole her lawnmower. Nichols statement was based on Moses' description to her that a white male was seen leaving her residence with a green jeep Cherokee with an attached trailer and her lawnmower on it. Jessica Nichols realized Daniel Miller owned/drove a jeep that matched Moses's description because she knew Daniel Miller. Also, Jessica learned from a friend of Daniel Miller that he was on a stealing spree and Daniel Miller did steal her lawnmower. JA. 42-46, 134.

All the facts in Dougans Application developed the suspect as a white male with the name Daniel Miller. At the risk of being redundant, Miller who is a black male, was *never developed* as a suspect/defendant in the theft of the Nichols lawnmower. JA. 27-135. As a result, Miller has (1) failed to make a substantial preliminary showing that Dougans made any of the two alleged false statements knowingly and intentionally, or with reckless disregard for the truth and (2) that the false information, if at all, was essential to the probable cause determination of Commissioner Thurston. Also, under *Smith*, *supra*, the reasonableness of Dougans actions does not turn on whether probable cause was in fact present, rather it is whether Dougans could have reasonably thought there was probable cause to seek the warrant. Id. at 356. For all the above reasons, Dougans could have reasonably thought there was probable cause to seek the warrant. JA. 78-79, 684-686.

Therefore, the district court properly ruled as a matter of law that Dougans actions were reasonable and Plaintiff did not make a substantial preliminary showing that Dougans knowingly and intentionally, or with reckless disregard for the truth, included information in his application for the warrant. JA. 684-685. Also, the district court ruled it could not conclude that the alleged false information was essential

to the probable cause determination. JA. 685. The court ruled the determination of probable cause "was based upon Dougans correct reporting to the magistrate that the white male identified as Daniel Miller was the person who had stolen the lawnmower." JA. 686. Additionally, the district court rejected the Plaintiff's argument that the tag number was falsified by Dougans. In doing so, the court stated that "you've got a statement signed by Mr. Moses that says he wrote the tag number down and if he didn't have the tag number, ... why would he write down that he wrote the tag number down." JA.668-671, 679-80.

Finally, the district court properly found as a matter of law that Dougans was entitled to qualified immunity since although "different facts in evidence could be used to support different conclusions as to whether [Dougans] deserve qualified immunity, this does not indicate a factual dispute, but rather, a question of law." See *Gould v. Davis*, 165 F. 3d 265, 269 (4th Cir. 1998).